Petition

81-384

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ALEXANDER L. STEVAS,
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No. ....

Supreme Court of the United States

OCTOBER TERM, 1980

THE STATE FAIR OF TEXAS,
Petitioner

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether an aerial tramway operated by Steck and Staph Attractions, Inc. for the State Fair of Texas on premises leased from the City of Dallas, Texas, is a "consumer product" within the meaning of the Consumer Product Safety Act (The Act), Public Law 92-573, 15 U.S.C. §2051, *et seq.*

2. Whether the State Fair of Texas, with reference to the aerial tramway, is "any factory, warehouse, or establishment in which consumer products are manufactured or held, in connection with distribution in commerce" so as to authorize inspection by the Consumer Product Safety Commission (the Commission) pursuant to Section 16(a) of the Act, Public Law 92-573, Section 16(a), 15 U.S.C. §2065(a).

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were:

THE STATE FAIR OF TEXAS
STECK AND STAPH ATTRACTIONS, INC.
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION

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The State Fair of Texas v. United States Consumer Product Safety Commission, ______ .F.2d .______ (decided June 30, 1981), attached as Appendix B.

STATEMENT OF GROUNDS OF JURISDICTION OF THE SUPREME COURT

i. The decision of the United States Court of Appeals was rendered on June 30, 1981. It may be found as Appendix B hereto.

ii. No motion for rehearing was filed.

iii. Jurisdiction is conferred on this Court by Section 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

This case involves a construction of the Consumer Product Safety Act, Public Law 92-573, 15 U.S.C. §2051, *et seq*. (1976). The text of the complete Act is set out in Appendix A.

Specifically involved in this petition is Section 16(a) of the Act [15 U.S.C. §2065(A)] which provides:

> "(a) for the purposes of implementing this chapter or rules or orders prescribed under this chapter, officers or employees duly designated by the Commission, upon presenting appropriate credentials and a written notice from the Commission to the owner, operator, or agent in charge are authorized —

> (1) to enter, at reasonable times (A) any factory, warehouse, or establishment in which *consumer products are manufactured* or held, in connection with distribution in commerce, or (B) any conveyance being used to transport consumer products in connection with distribution in commerce; and,
>
> (2) to inspect, at reasonable times and in a reasonable manner such conveyance or those areas of such factory, warehouse, or establishment *where such products are manufactured*, held, or transported and which may relate to the safety of such products. Each such inspection shall be commenced and completed with reasonable promptness." (emphasis added.)

"Consumer product" and "manufacturer" are defined in Section 3 of the Act (15 U.S.C. §2052) as:

"(a) for the purposes of this chapter:

> (1) The term 'consumer product' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include [there then follow a number of exceptions, none of which specifically applies here].

> (4) The term 'manufacturer' means any person who manufactures or imports a consumer product.

> (8) The term 'manufactured' means to manufacture, produce or assemble . . . ."

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PETITION FOR CERTIORARI

STATEMENT OF THE CASE

This litigation was instituted by the State Fair filing suit against the Commission in a federal court in Dallas, Texas, seeking to enjoin the Commission from conducting an investigation of the Fair's aerial tramway and for a declaratory judgment (1) that the aerial tramway was not a "consumer product" within the meaning of the Act, and (2) that inspection of the tramway was outside the authority granted to the Commission by the Act. Jurisdiction was asserted under the Act itself, as well as under Sections 1331 and 1337 of

Title 28 U.S.C., under the Administrative Procedure Act, 5 U.S.C. §701, *et seq.* and under the Declaratory Judgment Act, 28 U.S.C. §2201.

The district court, while denying immediate injunctive relief, did retain jurisdiction in a memorandum order of November 3, 1979.

Thereafter, on November 5, 1979, the Commission sought an ex parte administrative inspection warrant from a United States magistrate in Dallas, Texas. The Fair moved before the magistrate to quash the warrant asserting that the Commission's jurisdiction to conduct inspections did not extend to the aerial tramway or to entities such as the State Fair was.

The two actions, the one by the State Fair and the one by the Commission, were consolidated. Later, Steck and Staph filed an independent action seeking injunctive relief against the Commission and this, too, was consolidated with the others.

On November 13, 1979, the district court entered its order finding that the aerial tramway was in fact a consumer product but that the Commission had failed to show that the State Fair was a manufacturer subject to the inspection provisions of the Act, and, therefore, the warrant was quashed.

All parties appealed to the Court of Appeals which rendered its decision on June 30, 1981, finding that the aerial tramway was a consumer product and that the premises of the State Fair were subject to inspection because the tramway was assembled there. Circuit Judge Ainsworth dissented on the ground that the aerial tramway is not a consumer product.

No motion for rehearing was filed and it is from the judgment of June 30, 1981 that certiorari is sought.

ARGUMENT

Rule 21.1 of the Rules of the Supreme Court, in its subparagraph (j), requires that, at this point, the petition for writ of certiorari contain "a direct and concise argument amplifying the reasons relied on for the allowance of the writ," referring to Rule 17. Rule 17.1, insofar as it relates to a petition for certiorari to a federal court of appeals, states as the first "important reason" for granting such a writ: "When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . . ."

The Court of Appeals for the Fifth Circuit in this case has concluded that the aerial tramway is a consumer product as that term is defined in the Act (Opinion, page 22). In *Robert K. Bell Enterprises v. Consumer Product Safety Commission*, 645 F.2d 26 (10th Cir. 1981) the Court of Appeals for the Tenth Circuit, in a suit brought by the operator of an identical aerial tramway in Oklahoma for a declaratory judgment that the Consumer Product Safety Act did not apply to such a tramway, held, with one district judge sitting by designation dissenting, that the aerial tramway was not a consumer product as defined in the Act. The full opinion is attached as Appendix C.

It is impossible to conceive of a more direct conflict. The two decisions cannot be reconciled.

Petitioner respectfully submits that this conflict, making it virtually impossible for the Commission, on the one hand, and owners or operators of aerial tramways on the other, to know whether tramways are covered by the Act, should compel the granting of the petition and this Court's determination of a proper construction of the words "consumer product" as used in the Act and as applied to such tramways.

A second "important reason" for granting a petition for writ of ceriorari as set out in Rule 17.1(c) of the Rules of the Supreme Court is a decision by a federal court of appeals on an important question of federal law which has not been, but should be, settled by the Supreme Court. The scope of the Consumer Product Safety Act has not been before this Court and as can be seen from the plethora of litigation involving amusement rides, to cite just one example, there is a need for a statement by this Court as to the Act's scope, not only as to what is a consumer product but also as to who is a manufacturer subject to the inspections called for by the Act.

With reference to what is a "consumer product" the opinions by the Courts of Appeals for the Fifth and Tenth Circuits amply illustrate the wide variety of factors available to assist in a construction of the statutory language. Because of this Court's interdiction that a petition for writ of certiorari "shall be as short as possible" (Rule 21.4) we will not present here the argument which we would make to persuade the Court that the decision by the Court of Appeals for the Fifth Circuit is incorrect. We will reserve that for the opportunity presented after the petition has been granted.

Similarly, we would reserve the right to argue extensively as to the incorrectness of the Court's finding that the site of the State Fair of Texas may be entered by the Commission as an "establishment where [consumer] products are manufactured" to inspect the aerial tramway "and to examine documents" (Opinion, page 23). We would simply point out at this stage that, for the Court of Appeals to reach that conclusion, required a rather neat bit of mental legerdemain. The Act, in its Section 16 which we have quoted, authorizes the Commission to enter "any factory, warehouse, or establishment in which consumer products *are* manufactured . . . ." (emphasis added). Interpolating the statutory definition of "manufactured" literally would not make sense but assumedly it was intended to read that the Commission was authorized to enter any factory, warehouse or establishment in which consumer products *are* manufactured or produced or assembled.

The site of the State Fair of Texas is not an establishment where consumer products *are* manufactured, produced or assembled. Assuming *arguendo* that the aerial tramway is a consumer product, aerial tramways are not manufactured, produced or assembled at the State Fair grounds. Many years ago, one such tramway manufactured elsewhere was installed on the Fair grounds. To say that this was an assembly such as to make the owner of the premises a manufacturer subject to all the sanctions of the Consumer Product Safety Act would make each of us subject to the Act. For example, the father who purchased a bicycle for his child's Christmas and assembled it on Christmas Eve in his living room would then become a manufacturer of bicycles, subject to having the Commission enter his home and inspect the premises and the product.

Clearly, the statute was intended to say what it does say, i.e., that an assembler of consumer products is subject to the Act even though perhaps he does no more than assemble components and does not manufacture them.

Furthermore, the opinion of the Court of Appeals concludes that the Commission may enter the Fair's premises "and to examine documents." If by any stretch of anyone's imagination the Fair's premises are the site of the manufacture of the aerial tramway, the State Fair was not the manufacturer. It is undisputed that the site is and was owned by the City of Dallas. The aerial tramway was manufactured by van Roll Limited, a foreign corporation, and sold by it to Rogers-Gulledge, Inc. who were its first owners and operators. How then do records or documents of the State Fair of Texas have to do with the manufacture or assembly of the aerial tramway?

We think this is but illustrative of the illogic of the reasoning by the Court of Appeals and provides ample grounds for this Court to grant the petition and to give to all of the concerned industries as well as to the Commission an authoritative interpretation of the Consumer Product Safety Act.

Wherefore, premises considered, the State Fair of Texas respectfully prays that this its petition for writ of certiorari be in all things granted, that this cause be set for argument before the Court, that it have an opportunity to present more complete briefing on the points to be submitted to the Court and that the Court, in its decision, reverse the judgment of the Court of Appeals and find that the aerial tramway in question is not a consumer product and the site where it is located is not an establishment where consumer products are manufactured and for such other relief to which it may show itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Certiorari has been furnished to the following counsel of record by United States mail, on this the ______ day of ____________, 1981:

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APPENDIX A

§2051. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSE

(a) The Congress finds that—

(1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;

(2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;

(3) the public should be protected against unreasonable risks of injury associated with consumer products;

(4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;

(5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and

(6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter.

(b) The purposes of this chapter are—

(1) to protect the public against unreasonable risks of injury associated with consumer products;

(2) to assist consumers in evaluating the comparative safety of consumer products;

(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

§2052. DEFINITIONS

(a) For purposes of this chapter:

(1) The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—

(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,

(B) tobacco and tobacco products,

(C) motor vehicles or motor vehicle equipment (as defined by sections 1391(3) and (4) of this title),

(D) pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act),

(E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of Title 26 (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of Title 26), or any component of any such article,

(F) aircraft, aircraft engines, propellers, or appliances (as defined in section 1301 of Title 49),

(G) boats which could be subjected to safety regulation under the Federal Boat Safety Act of 1971; vessels, and appurtenances to vessels (other than such boats), which could be subjected to safety regulation under title 52 of the Revised Statutes or other marine safety statutes administered by the department in which the Coast Guard is operating; and equipment (including associated equipment, as defined in section 1452(8) of Title 46) to the extent that a risk of injury associated with the use of such equipment on boats or vessels could be eliminated or reduced by actions taken under any statute referred to in this subparagraph,

(H) drugs, devices, or cosmetics (as such terms are defined in sections 321(g), (h), and (i) of Title 21), or

(I) food. The term "food", as used in this subparagraph means all "food", as defined in section 321(f) of Title 21, including poultry and poultry products (as defined in section 453(e) and (f) of Title 21), meat, meat food products (as defined in section 601(j) of Title 21), and eggs and egg products (as defined in section 1033 of Title 21).

Except for the regulation under this chapter or the Federal Hazardous Substances Act of fireworks devices or any substance intended for use as a component of any such device, the Commission shall have no authority under the functions transferred pursuant to section 2079 of this title to regulate any product or article described in subparagraph (E) of this paragraph or described, without regard to quantity, in section 845(a)(5) of Title 18. See sections 2079(d) and 2080 of this title, for other limitations on Commission's authority to regulate certain consumer products.

(2) The term "consumer product safety rule" means a consumer products safety standard described in section 2056(a) of this title, or a rule under this chapter declaring a consumer product a banned hazardous product.

(3) The term "risk of injury" means a risk of death, personal injury, or serious or frequent illness.

(4) The term "manufacture" means any person who manufactures or imports a consumer product.

(5) The term "distributor" means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.

(6) The term "retailer" means a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer.

(7) (A) The term "private labeler" means an owner of a brand or trademark on the label of a consumer product which bears a private label.

(B) A consumer product bears a private label if (i) the product (or its container) is labeled with the brand or trademark of a person other than a manufacturer of the product, (ii) the person with whose brand or trademark the product (or container) is labeled has authorized or caused the product to be so labeled, and (iii) the brand or trademark of a manufacturer of such product does not appear on such label.

(8) The term "manufactured" means to manufacture, produce, or assemble.

(9) The term "Commission" means the Consumer Product Safety Commission, established by section 2053 of this title.

(10) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, Wake Island, Midway Island, Kingman Reef, Johnston Island, the Canal Zone, American Samoa, or the Trust Territory of the Pacific Islands.

(11) The terms "to distribute in commerce" and "distribution in commerce" mean to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.

(12) The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(13) The terms "import" and "importation" include reimporting a consumer product manufactured or processed, in whole or in part, in the United States.

(14) The term "United States", when used in the geographic sense, means all of the States (as defined in paragraph (10) of this subsection).

(b) A common carrier, contract carrier, or freight forwarder shall not, for purposes of this chapter, be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder.

§2053. CONSUMER PRODUCT SAFETY COMMISSION

Establishment: Chairman

(a) An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, from among the members of the Commission. An individual may be appointed as a member of the Commission and as Chairman at the same time. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.

Term: Vacancies

(b)(1) Except as provided in paragraph (2), (A) the Commissioners first appointed under this section shall be appointed for terms ending three, four, five, six, and seven years, respectively, after October 27, 1972, the term of each to be designated by the President at the time of nomination; and (B) each of their successors shall be appointed for a term of seven years from the date of the expiration of the term for which his predecessor was appointed.

(2) Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term until his successor has taken office, except that he may not so continue to serve more than one year after the date on which his term would otherwise expire under this subsection.

Restrictions on Commissioners' outside activities

(c) Not more than three of the Commissioners shall be affiliated with the same political party. No individual (1) in the employ of, or holding any official relation to, any person engaged in selling or manufacturing consumer products, or (2) owning stock or bonds of substantial value in a person so engaged, or (3) who is in any other manner pecuniarily interested in such a person, or in a substantial supplier of such a person, shall hold the office of Commissioner. A Commissioner may not engage in any other business, vocation, or employment.

Quorum; seal; Vice Chairman

(d) No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission, but three members of the Commission shall constitute a quorum for the transaction of business. The Commission shall have an official seal of which judicial notice shall be taken. The Commission shall annually elect a Vice Chairman to act in the absence or disability of the Chairman or in case of a vacancy in the office of the Chairman.

Offices

(e) The Commission shall maintain a principal office and such field offices as it deems necessary and may meet and exercise any of its powers at any other place.

Functions of Chairman: request for appropriations

(f)(1) The Chairman of the Commission shall be the principal executive officer of the Commission, and he shall exercise all of the executive and administrative functions of the

Commission, including functions of the Commission with respect to (A) the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of commissioners other than the Chairman), (B) the distribution of business among personnel appointed and supervised by the Chairman and among administrative units of the Commission, and (C) the use and expenditure of funds.

(2) In carrying out any of his functions under the provisions of this subsection the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(3) Requests or estimates for regular, supplement, or deficiency appropriations on behalf of the Commission may not be submitted by the Chairman without the prior approval of the Commission.

Executive Director; officers and employees

(g)(1) The Chairman, subject to the approval of the Commission, shall appoint an Executive Director, a General Counsel, a Director of Engineering Sciences, a Director of Epidemiology, and a Director of Information. No individual so appointed may receive pay in excess of the annual rate of basic pay in effect for grade GS-18 of the General Schedule.

(2) The Chairman, subject to subsection (f)(2) of this section, may employ such other officers and employees (including attorneys) as are necessary in the execution of the Commission's functions. No regular officer or employee of the Commission who was at any time during the 12 months preceding the termination of his employment with the Commission compensated at a rate in excess of the annual rate

of basic pay in effect for grade GS-14 of the General Schedule, shall accept employment or compensation from any manufacturer subject to this chapter, for a period of 12 months after terminating employment with the Commission.

(3) In addition to the number of positions authorized by section 5108(a) of Title 5, the Chairman, subject to the approval of the Commission, and subject to the standards and procedures prescribed by chapter 51 of Title 5, may place a total of twelve positions in grades GS-16, GS-17, and GS-18.

(4) The appointment of any officer (other than a Commissioner) or employee of the Commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

Civil action against the United States

(h) Subsections (a) and (h) of section 2680 of Title 28 do not prohibit the bringing of a civil action on a claim against the United States which—

(1) is based upon—

(A) misrepresentation or deceit on the part of the Commission or any employee thereof, or

(B) any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the Commission or any employee thereof, which exercise, performance, or failure was grossly negligent; and

(2) is not made with respect to any agency action (as defined in section 551(13) of Title 5).

In the case of a civil action on a claim based upon the exercise or performance of, or failure to exercise or perform, a discretionary function, no judgment may be entered against the United States unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances including the statutory responsibility of the Commission and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure or exercise or perform was unreasonable.

§2054. PRODUCT SAFETY INFORMATION AND RESEARCH; INJURY INFORMATION CLEARINGHOUSE

(a) The Commission shall—

(1) maintain an Injury Information Clearinghouse to collect, investigate, analyze, and disseminate injury data, and information, relating to the causes and prevention of death, injury, and illness associated with consumer products; and

(2) conduct such continuing studies and investigations of deaths, injuries, diseases, other health impairments, and economic losses resulting from accidents involving consumer products as it deems necessary.

(b) The Commission may—

(1) conduct research, studies, and investigations on the safety of consumer products and on improving the safety of such products;

(2) test consumer products and develop product safety test methods and testing devices; and

(3) offer training in product safety investigation and test methods, and assist public and private organizations, administratively and technically, in the development of safety standards and test methods.

(c) In carrying out its functions under this section, the Commission may make grants or enter into contracts for the conduct of such functions with any person (including a governmental entity).

(d) Whenever the Federal contribution for any information, research, or development activity authorized by this chapter is more than minimal, the Commission shall include in any contract, grant, or other arrangement for such activity, provisions effective to insure that the rights of all information, uses, processes, patents, and other developments resulting from that activity will be made available to the public without charge on a nonexclusive basis. Nothing in this subsection shall be construed to deprive any person of any right which he may have had, prior to entering into any arrangement referred to in this subsection, to any patent, patent application, or invention.

§2055. PUBLIC DISCLOSURE OF INFORMATION

(a)(1) Nothing contained in this chapter shall be deemed to require the release of any information described by subsection (b) of section 552 of Title 5 or which is otherwise protected by law from disclosure to the public.

(a) All information reported to or otherwise obtained by the Commission or its representative under this chapter which information contains or relates to a trade secret or other matter referred to in section 1905 of Title 18 shall be considered confidential and shall not be disclosed, except that such information may be disclosed to other officers or employees concerned with carrying out this chapter or when relevant in any proceeding under this chapter. Nothing in this chapter shall authorize the withholding of information by the Commission or any officer or employee under its control from the duly authorized committees of the Congress.

(b)(1) Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this chapter, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter. If the Commission finds that, in the administration of this chapter, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

(2) Paragraph (1) (except for the last sentence thereof) shall not apply to the public disclosure of (A) information about any consumer product with respect to which product the Commission has filed an action under section 2061 of this title (relating to imminently hazardous products), or

which the Commission has reasonable cause to believe is in violation of section 2068 of this title (relating to prohibited acts), or (B) information in the course of or concerning any administrative or judicial proceeding under this chapter.

(c) The Commission shall communicate to each manufacturer of a consumer product, insofar as may be practicable, information as to any significant risk of injury associated with such product.

§2056. CONSUMER PRODUCT SAFETY STANDARDS — TYPES OF REQUIREMENTS

(a)(1) The Commission may by rule, in accordance with this section and section 2058 of this title, promulgate consumer product safety standards. A consumer product safety standard shall consist of one or more of any of the following types of requirements:

(A) Requirements as to performance, composition, contents, design, construction, finish, or packaging of a consumer product.

(B) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product. The requirements of such a standard (other than requirements relating to labeling, warnings, or instructions) shall, whenever feasible, be expressed in terms of performance requirements.

(2) No consumer product safety standard promulgated under this section shall require, incorporate, or reference

any sampling plan. The preceding sentence shall not apply with respect to any consumer product safety standard or other agency action of the Commission under this chapter (A) applicable to a fabric, related material, or product which is subject to a flammability standard or for which a flammability standard or other regulation may be promulgated under the Flammable Fabrics Act, or (B) which is or may be applicable to glass containers.

Proceedings for development of standards; notice; development period; consultation; expeditious development by Commission; publication; comments

(b)(1) A proceeding for the development of a consumer product safety standard under this chapter shall be commenced by the publication in the Federal Register of a notice which shall—

(A) identify the product and the nature of the risk of injury associated with the product;

(B) state the Commission's determination that a consumer product safety standard is necessary to eliminate or reduce the risk of injury;

(C) include information with respect to any existing standard known to the Commission which may be relevant to the proceeding;

(D) include—

(i) an invitation for any person (other than the Commission), within thirty days after the date of publication of the notice, to submit to the Commission an existing standard as the proposed consumer product safety standard; and

(ii) (I) an invitation for any person (other than the Commission, within thirty days after the date of publication of the notice, to offer to develop the proposed consumer product safety standard; or

(II) a statement that the Commission intends to develop the proposed consumer product safety standard; and

(E) specify the period of time in which the offeror of an accepted offer and the Commission, or the Commission acting by itself, is to develop the proposed standard.

(2) After consultation with such interested parties as the Commission shall deem necessary, the Commission may develop a consumer product safety standard without making any invitation specified in paragraph (1)(D)(ii)(I) and may publish such standard as a proposed consumer product safety rule whenever the Commission determines, taking into account—

(i) the nature of the risk of injury associated with such product;

(ii) the expertise of the Commission with respect to such risk of injury,

(iii) the expertise of the Commission in developing consumer product safety standards, and

(iv) the resources available to the Commission and the priorities established by the Commission,

that to develop a consumer product safety standard which would adequately protect the public from such risk of injury, it is more expeditious for the Commission to develop the standard than to proceed under paragraph (1)(D)(ii)(I) for its development. The Commission shall give interested persons opportunity to submit written comments to the Commission during the thirty-day period following publication of such determination under paragraph (1).

Publication of proposed safety rules developed from existing standards

(c) If the Commission determines—

(1) that any standard submitted to it pursuant to an invitation made under subsection (B)(1)(D)(i) of this section, or

(2) that any standard (other than one submitted under subsection (b)(1)(D)(i) of this section) issued, adopted, or proposed by any Federal department or agency (other than the Commission) or by any other qualified agency, organization, or institution,

if promulgated (in whole, in part, or in combination with any other standard described in paragraph (1) or (2) or any part of such a standard) as a consumer product safety rule, would eliminate or reduce an unreasonable risk of injury associated with a consumer product, the Commission may publish such standard, in whole, in part, or in such combination and with nonmaterial modifications, as a proposed consumer product safety rule. In the case of a standard described in paragraph (2), the Commission may publish such standard, in whole, in part, or in such combination and with nonmaterial modifications, as a proposed consumer product safety rule without making an invitation under subsection (b)(1)(D)(i) of this section.

Offers to develop proposed standards; Commission's contribution to development costs; regulations

(d)(1) Except as provided by subsection (b)(2) and by subsection (c) of this section, the Commission shall accept one, and may accept more than one, offer to develop a proposed consumer product safety standard pursuant to the invitation prescribed by subsection (b)(1)(D)(ii)(I) of this section, if it determines that the offeror is technically competent, is likely to develop an appropriate standard within the period specified in the invitation under subsection (b)(1)(E) of this section, and will comply with regulations of the Commission under paragraph (3) of this subsection. The Commission shall publish in the Federal Register the name and address of each person whose offer it accepts, and a summary of the terms of such offer as accepted.

(2) If an offer is accepted under this subsection or if any person participates with the Commission in the development of a consumer product safety standard under subsection (b)(2)(A) or subsection (e) of this section, the Commission may agree to contribute to the offeror's cost in developing a proposed consumer product safety standard or the person's cost with respect to such participation, in any case in which the Commission determines that such contribution is likely to result in a more satisfactory standard than would be developed without such contribution, and that the offeror or person is financially responsible. Regulations of the Commission shall set forth the items of cost in which it may participate, and shall exclude any contribution to the acquisition of land or buildings. Payments under agreements entered into under this paragraph may be made without regard to section 529 of Title 31.

(3) The Commission shall prescribe regulations governing the development of proposed consumer product safety standards by persons whose offers are accepted under paragraph (1). Such regulations shall include requirements—

(A) that standards recommended for promulgation be suitable for promulgation under this chapter, be supported by test data or such other documents or materials as the Commission may reasonably require to be developed, and (where appropriate) contain suitable test methods for measurement of compliance with such standards;

(B) for notice and opportunity by interested persons (including representatives of consumers and consumer organizations) to participate in the development of such standards;

(C) for the maintenance of records, which shall be available to the public, to disclose the course of the development of standards recommended for promulgation, the comments and other information submitted by any person in connection with such development (including dissenting views and comments and information with respect to the need for such recommended standards), and such other matters as may be relevant to the evaluation of such recommended standards; and

(D) that the Commission and the Comptroller General of the United States, or any of their duly authorized representatives, have access for the purpose of audit and examination to any books, documents, papers, and records relevant to the development of such recommended standards or to the expenditure of any contribution of the Commission for the development of such standards.

(4) The Commission shall prescribe regulations governing the development of proposed consumer product safety rules by the Commission under subsection (b)(2) and subsection (e)(1) of this section. Such regulations shall include the requirements specified in subparagraphs (B), (C), and (D) of paragraph (3).

Development of proposed safety rules by Commission; publication

(e)(1) If the Commission publishes a notice pursuant to subsection (b)(1)(D)(ii)(I) of this section for the development of a consumer product safety standard and if the Commission does not, within 30 days after the date of publication of such notice, accept an offer to develop such a standard, then the Commission may develop a proposed consumer safety rule with respect to such product and publish such proposed rule.

(2) If the Commission accepts an offer to develop a proposed consumer product safety standard under subsection (b)(1)(D)(ii)(I) of this section, the Commission may not develop a proposed consumer product safety rule or publish such proposed rule unless—

(A) the development period specified in subsection (b)(1)(E) of this section for such standard ends;

(B) no offeror whose offer was accepted is making satisfactory progress in the development of such proposed standard; or

(C) the sole offer accepted under subsection (b)(1)(D)(ii)(I) of this section is that of an offeror which is the manufacturer, distributor, or retailer of a consumer product proposed to be regulated by the consumer product safety standard.

Termination of proceedings; publication in Federal Register; reasons for nonpublication of proposed standards

(f) If the Commission publishes a notice pursuant to subsection (b) of this section and the Commission does not publish a proposed consumer product safety standard within forty-five days after the expiration of the period specified in subsection (b)(1)(E) of this section, the Commission shall—

(1) by notice published in the Federal Register, terminate the proceeding begun by such notice published pursuant to subsection (b) of this section; or

(2) publish in the Federal Register the reasons for not publishing the proposed standard, and specify the time period within which either such standard will be published or the proceeding begun by such notice published pursuant to subsection (b) of this section will be terminated without publication of such proposed standard.

The reasons referred to in paragraph (2) may include a statement that the Commission is considering other approaches (such as a voluntary consumer safety standard adopted by persons who would be subject to such proposed standard) to eliminate the unreasonable risk of injury that is the subject of such proceeding.

§2057. BANNED HAZARDOUS PRODUCTS

Whenever the Commission finds that—

(1) a consumer product is being, or will be, distributed in commerce and such consumer product presents an unreasonable risk of injury; and

(2) no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product,

the Commission may propose and, in accordance with section 2058 of this title, promulgate a rule declaring such product a banned hazardous product.

§2058. ADMINISTRATIVE PROCEDURE GOVERNING PROMULGATION OF CONSUMER PRODUCT SAFETY RULES

Promulgation; withdrawal of notice of proceeding

(a)(1) Within 60 days after the publication under section 2056 or 2057 of this title of a proposed consumer product safety rule respecting a risk of injury associated with a consumer product, the Commission shall—

(A) promulgate a consumer product safety rule respecting the risk of injury associated with such product if it makes the findings required under subsection (c) of this section, or

(B) withdraw by rule the applicable notice of proceeding if it determines that such rule is not (i) reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product, or (ii) in the public interest;

except that the Commission may extend such 60-day period for good cause shown (if it publishes its reasons therefor in the Federal Register).

(2) Consumer product safety rules which have been proposed under section 2056 or 2057 of this title shall be promulgated pursuant to section 553 of Title 5, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

Identification of risk of injury; consideration of available product data; special needs of elderly and handicapped

(b) A consumer product safety rule shall express in the rule itself the risk of injury which the standard is designed to eliminate or reduce. In promulgating such a rule the Commission shall consider relevant available product data including the results of research, development, testing, and investigation activities conducted generally and pursuant to this chapter. In the promulgation of such a rule the Commission shall also consider and take into account the special needs of elderly and handicapped persons to determine the extent to which such persons may be adversely affected by such rule.

Findings for inclusion in rules; required findings

(c)(1) Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to—

(A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce;

(B) the approximate number of consumer products, or types or classes thereof, subject to such rule;

(C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and

(D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.

(2) The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule)—

(A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product;

(B) that the promulgation of the rule is in the public interest; and

(C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product.

Effective dates for rules and standards; stockpiling

(d)(1) Each consumer product safety rule shall specify the date such rule is to take effect not exceeding 180 days from the date promulgated, unless the Commission finds, for good cause shown, that a later effective date is in the public interest and publishes its reasons for such finding. The effective date of a consumer product safety standard under this chapter shall be set at a date at least 30 days after the date of promulgation unless the Commission for good cause shown determines that an earlier effective date is in the public interest. In no case may the effective date be set at a date which is earlier than the date of promulgation. A consumer product safety standard shall be applicable only to consumer products manufactured after the effective date.

(2) The Commission may by rule prohibit a manufacturer of a consumer product from stockpiling any product to which a consumer product safety rule applies, so as to prevent such manufacturer from circumventing the purpose of such consumer product safety rule. For purposes of this paragraph, the term "stockpiling" means manufacturing or importing a product between the date of promulgation of such consumer product safety rule and its effective date at a rate which is significantly greater (as determined under the rule under this paragraph) than the rate at which such product was produced or imported during a base period

(prescribed in the rule under this paragraph) ending before the date of promulgation of the consumer product safety rule.

Amendment and revocation of rules

(e) The Commission may by rule amend or revoke any consumer product safety rule. Such amendment or revocation shall specify the date on which it is to take effect which shall not exceed 180 days from the date the amendment or revocation is published unless the Commission finds for good cause shown that a later effective date is in the public interest and publishes its reasons for such finding. Where an amendment involves a material change in a consumer product safety rule, sections 2056 and 2057 of this title, and subsections (a) through (d) of this section shall apply. In order to revoke a consumer product safety rule, the Commission shall publish a proposal to revoke such rule in the Federal Register, and allow oral and written presentations in accordance with subsection (a)(2) of this section. It may revoke such rule only if it determines that the rule is not reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product. Section 2060 of this title shall apply to any amendment of a consumer product safety rule which involves a material change and to any revocation of a consumer product safety rule, in the same manner and to the same extent as such section applies to the Commission's action in promulgating such a rule.

§2059. PETITION FOR CONSUMER PRODUCT SAFETY RULE

(a) Any interested person, including a consumer or consumer organization, may petition the Commission to commence a proceeding for the issuance, amendment, or revocation of a consumer product safety rule.

Contents of petition

(b) Such petition shall be filed in the principal office of the Commission and shall set forth (1) facts which it is claimed establish that a consumer product safety rule or an amendment or revocation thereof is necessary, and (2) a brief description of the substance of the consumer product safety rule or amendment thereof which it is claimed should be issued by the Commission.

Hearing; investigation

(c) The Commission may hold a public hearing or may conduct such investigation or proceeding as it deems appropriate in order to determine whether or not such petition should be granted.

Grant or denial of petition

(d) Within 120 days after filing of a petition described in subsection (b) of this section, the Commission shall either grant or deny the petition. If the Commission grants such petition, it shall promptly commence an appropriate proceeding under section 2056 or 2057 of this title. If the Commission denies such petition it shall publish in the Federal Register its reasons for such denial.

Civil action; costs

(e)(1) If the Commission denies a petition made under this section (or if it fails to grant or deny such petition within the 120-day period) the petitioner may commence a civil action in a United States district court to compel the Commission to initiate a proceeding to take the action requested. Any such action shall be filed within 60 days after the Commission's denial of the petition, or (if the Commission fails to grant or deny the petition within 120 days after filing the petition) within 60 days after the expiration of the 120-day period.

(2) If the petitioner can demonstrate to the satisfaction of the court, by a preponderance of evidence in a de novo proceeding before such court, that the consumer product presents an unreasonable risk of injury, and that the failure of the Commission to initiate a rulemaking proceeding under section 2056 or 2057 of this title unreasonably exposes the petitioner or other consumers to a risk of injury presented by the consumer product, the court shall order the Commission to initiate the action requested by the petitioner.

(3) In any action under this subsection, the district court shall have no authority to compel the Commission to take any action other than the initiation of a rule-making proceeding in accordance with section 2056 or 2057 of this title.

(4) In any action under this subsection the court may in the interest of justice award the costs of suit, including reasonable attorneys' fees and reasonable expert witnesses' fees. Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of Title 28, or any other provision of law. For purposes of this paragraph and sections 2060(c), 2072(a), and 2073 of this title, a reasonable attorney's fee is a fee (A) which is based upon (i) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this subsection, and (ii) such reasonable expenses as may be incurred by the attorney in the provision of such services, and (B) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee.

§2060. JUDICIAL REVIEW OF CONSUMER PRODUCT SAFETY RULES — PETITION BY PERSONS ADVERSELY AFFECTED, CONSUMERS OR CONSUMER ORGANIZATIONS

(a) Not later than 60 days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by such rule, or any consumer or consumer organization, may file a petition with the United States court of appeals for the District of Columbia or for the circuit in which such person, consumer, or organization resides or has his principal place of business for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The record of the proceedings on which the Commission based its rule shall be filed in the court as provided for in section 2112 of Title 28. For purposes of this section, the term "record" means such consumer product safety rule; any notice or proposal published pursuant to section 2056, 2057, or 2058 of this title; the transcript required by section 2058(a)(2) of this title of any oral presentation; any written submission of interested parties; and any other information which the Commission considers relevant to such rule.

Additional data, views, or arguments

(b) If the petitioner applies to the court for leave to adduce additional data, views, or arguments and shows to the satisfaction of the court that such additional data, views, or arguments are material and that there were reasonable grounds for the petitioner's failure to adduce such data, views, or arguments in the proceeding before the Commission, the court may order the Commission to provide additional opportunity for the oral presentation of data, views, or arguments and for written submissions. The Commission may modify its findings, or make new findings by reason of the additional data, views, or arguments so taken and shall file such modified or new findings, and its recommendation, if any, for the modification or setting aside of its original rule, with the return of such additional data, views, or arguments.

Jurisdiction, costs and attorneys' fees; substantial evidence to support administrative findings

(c) Upon the filing of the petition under subsection (a) of this section the court shall have jurisdiction to review the consumer product safety rule in accordance with chapter 7 of Title 5, and to grant appropriate relief, including interim relief, as provided in such chapter. A court may in the interest of justice include in such relief an award of the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2059(e)(4) of this title and reasonable expert witnesses' fees. Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of Title 28, or any other provision of law. The consumer product safety rule shall not be affirmed unless the Commission's findings under section 2058(c) of this title are supported by substantial evidence on the record taken as a whole.

Supreme Court review

(d) The judgment of the court affirming or setting aside, in whole or in part, any consumer product safety rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

Availability of other remedies

(e) The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by law.

§2061. IMMINENT HAZARDS—FILING OF ACTION

(a) The Commission may file in a United States district court an action (1) against an imminently hazardous consumer product for seizure of such product under subsection (b)(2) of this section, or (2) against any person who is a manufacturer, distributor, or retailer of such product, or (3) against both. Such an action may be filed notwithstanding the existence of a consumer product safety rule applicable to such product, or the pendency of any administrative or judicial proceedings under any other provision of this chapter. As used in this section, and hereinafter in this chapter, the term "imminently hazardous consumer product" means a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury.

Relief; product condemnation and seizure

(b)(1) The district court in which such action is filed shall have jurisdiction to declare such product an imminently hazardous consumer product, and (in the case of an action under subsection (a)(2) of this section) to grant (as ancillary to such declaration or in lieu thereof) such temporary or permanent relief as may be necessary to protect the public from such risk. Such relief may include a mandatory order requiring the notification of such risk to purchasers of such product known to the defendant, public notice, the recall, the repair or the replacement of, or refund for, such product.

(2) In the case of an action under subsection (a)(1) of this section, the consumer product may be proceeded against by process of libel for the seizure and condemnation of such product in any United States district court within the jurisdiction of which such consumer product is found. Proceedings and cases instituted under the authority of the preceding sentence shall conform as nearly as possible to proceedings in rem in admiralty.

Consumer product safety rule

(c) Where appropriate, concurrently with the filing of such action or as soon thereafter as may be practicable, the Commission shall initiate a proceeding to promulgate a consumer product safety rule applicable to the consumer product with respect to which such action is filed.

Consultation with Product Safety Advisory Council

(d)(1) Prior to commencing an action under subsection (a) of this section, the Commission may consult the Product Safety Advisory Council (established under section 2077 of this title) with respect to its determination to commence such action, and request the Council's recommendations as to the type of temporary or permanent relief which may be necessary to protect the public.

(2) The Council shall submit its recommendations to the Commission within one week of such request.

(3) Subject to paragraph (2), the Council may conduct such hearing or offer such opportunity for the presentation of views as it may consider necessary or appropriate.

Jurisdiction and venue; process; subpena

(e)(1) An action under subsection (a)(2) of this section may be brought in the United States district court for the District of Columbia or in any judicial district in which any of the defendants is found, is an inhabitant or transacts business; and process in such an action may be served on a defendant in any other district in which such defendant resides or may be found. Subpenas requiring attendance of witnesses in such an action may run into any other district. In determining the judicial district in which an action may be brought under this section in instances in which such action may be brought in more than one judicial district, the Commission shall take into account the convenience of the parties.

(2) Whenever proceedings under this section involving substantially similar consumer products are pending in courts in two or more judicial districts, they shall be consolidated for trial by order of any such court upon application reasonably made by any party in interest, upon notice to all other parties in interest.

Employment of attorneys by Commission

(f) Notwithstanding any other provision of law, in any action under this section, the Commission may direct attorneys employed by it to appear and represent it.

§2062. NEW CONSUMER PRODUCTS

(a) The Commission may, by rule, prescribe procedures for the purpose of insuring that the manufacturer of any new consumer product furnish notice and a description of such product to the Commission before its distribution in commerce.

(b) For purposes of this section, the term "new consumer product" means a consumer product which incorporates a design, material, or form of energy exchange which (1) has not previously been used substantially in consumer products and (2) as to which there exists a lack of information adequate to determine the safety of such product in use by consumers.

§2063. PRODUCT CERTIFICATION AND LABELING

(a)(1) Every manufacturer of a product which is subject to a consumer product safety standard under this chapter and which is distributed in commerce (and the private labeler of such product if it bears a private label) shall issue a certificate which shall certify that such product conforms to all applicable consumer product safety standards, and shall specify any standard which is applicable. Such certificate shall accompany the product or shall otherwise be furnished to any distributor or retailer to whom the product is delivered. Any certificate under this subsection shall be based on a test of each product or upon a reasonable testing program; shall state the name of the manufacturer or private labeler issuing the certificate; and shall include the date and place of manufacture.

(2) In the case of a consumer product for which there is more than one manufacturer or more than one private labeler, the Commission may by rule designate one or more of such manufacturers or one or more of such private labelers (as the case may be) as the persons who shall issue the certificate required by paragraph (1) of this subsection, and may exempt all other manufacturers of such product or all other private labelers of the product (as the case may be) from the requirement under paragraph (1) to issue a certificate with respect to such product.

(b) The Commission may by rule prescribe reasonable testing programs for consumer products which are subject to consumer product safety standards under this chapter and for which a certificate is required under subsection (a) of this section. Any test or testing program on the basis of which a certificate is issued under subsection (a) of this section may, at the option of the person required to certify the product, be conducted by an independent third party qualified to perform such tests or testing programs.

(c) The Commission may by rule require the use and prescribe the form and content of labels which contain the following information (or that portion of it specified in the rule)—

(1) The date and place of manufacture of any consumer product.

(2) A suitable identification of the manufacturer of the consumer product, unless the product bears a private label in which case it shall identify the private labeler and shall also contain a code mark which will permit the seller of such product to identify the manufacturer thereof to the purchaser upon his request.

(3) In the case of a consumer product subject to a consumer product safety rule, a certification that the product meets all applicable consumer product safety standards and a specification of the standards which are applicable.

Such labels, where practicable, may be required by the Commission to be permanently marked on or affixed to any such consumer product. The Commission may, in appropriate cases, permit information required under paragraphs (1) and (2) of this subsection to be coded.

§2064. SUBSTANTIAL PRODUCT HAZARDS

(a) For purposes of this section, the term "substantial product hazard" means—

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

Noncompliance with applicable consumer product safety rules; product defects; notice to Commission by manufacturer, distributor, or retailer

(b) Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

(1) fails to comply with an applicable consumer product safety rule; or

(2) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section,

shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

Public notice of defect or failure to comply; mail notice

(c) If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:

(1) To give public notice of the defect or failure to comply.

(2) To mail notice to each person who is a manufacturer, distributor, or retailer of such product.

(3) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

Any such order shall specify the form and content of any notice required to be given under such order.

Repair; replacement; refunds; action plan

(d) If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to take whichever of the following actions the person to whom the order is directed elects:

(1) To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.

(2) To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.

(3) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (A) at the time of public notice under subsection (c) of this section, or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking action under whichever of the preceding paragraphs of this subsection under which such person has elected to act. The Commission shall specify in the order the persons to whom refunds must be made if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States), or from doing any combination of such actions, the product with respect to which the order was issued.

Reimbursement

(e)(1) No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d) of this section, and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

(2) An order issued under subsection (c) or (d) of this section with respect to a product may require any person who is a manufacturer, distributor, or retailer of the product to reimburse any other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest.

Hearing

(f) An order under subsection (c) or (d) of this section may be issued only after an opportunity for a hearing in accordance with section 554 of Title 5, except that, if the Commission determines that any person who wishes to participate in such hearing is a part of a class of participants who share an identity of interest, the Commission may limit such person's participation in such hearing to participation through a single representative designated by such class (or by the Commission if such class fails to designate such a representative).

Preliminary injunction

(g)(1) If the Commission has initiated a proceeding under this section for the issuance of an order under subsection (d) of this section with respect to a product which the Commission has reason to believe presents a substantial product hazard, the Commission (without regard to section

2076(b)(7) of this title) or the Attorney General may, in accordance with section 2061(e)(1) of this title, apply to a district court of the United States for the issuance of a preliminary injunction to restrain the distribution in commerce of such product pending the completion of such proceeding. If such a preliminary injunction has been issued, the Commission (or the Attorney General if the preliminary injunction was issued upon an application of the Attorney General) may apply to the issuing court for extensions of such preliminary injunction.

(2) Any preliminary injunction, and any extension of a preliminary injunction, issued under this subsection with respect to a product shall be in effect for such period as the issuing court prescribes not to exceed a period which extends beyond the thirtieth day from the date of the issuance of the preliminary injunction (or, in the case of a preliminary injunction which has been extended, the date of its extension) or the date of the completion or termination of the proceeding under this section respecting such product, whichever date occurs first.

(3) The amount in controversy requirement of section 1331 of Title 28, does not apply with respect to the jurisdiction of a district court of the United States to issue or extend a preliminary injunction under this subsection.

§2065. INSPECTION AND RECORDKEEPING

(a) For purposes of implementing this chapter, or rules or orders prescribed under this chapter, officers or employees duly designated by the Commission, upon presenting appropriate credentials and a written notice from the Commission to the owner, operator, or agent in charge, are authorized—

(1) to enter, at reasonable times, (A) any factory, warehouse, or establishment in which consumer products are

manufactured or held, in connection with distribution in commerce, or (B) any conveyance being used to transport consumer products in connection with distribution in commerce; and

(2) to inspect, at reasonable times and in a reasonable manner such conveyance or those areas of such factory, warehouse, or establishment where such products are manufactured, held, or transported and which may relate to the safety of such products. Each such inspection shall be commenced and completed with reasonable promptness.

(b) Every person who is a manufacturer, private labeler, or distributor of a consumer product shall establish and maintain such records, make such reports, and provide such information as the Commission may, by rule, reasonably require for the purposes of implementing this chapter, or to determine compliance with rules or orders prescribed under this chapter. Upon request of an officer or employee duly designated by the Commission, every such manufacturer, private labeler, or distributor shall permit the inspection of appropriate books, records, and papers relevant to determining whether such manufacturer, private labeler, or distributor has acted or is acting in compliance with this chapter and rules under this chapter.

§2066. IMPORTED PRODUCTS—REFUSAL OF ADMISSION

(a) Any consumer product offered for importation into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States) shall be refused admission into such customs territory if such product—

(1) fails to comply with an applicable consumer product safety rule;

(2) is not accompanied by a certificate required by section 2063 of this title, or is not labeled in accordance with regulations under section 2063(c) of this title;

(3) is or has been determined to be an imminently hazardous consumer product in a proceeding brought under section 2061 of this title;

(4) has a product defect which constitutes a substantial product hazard (within the meaning of section 2064(a)(2) of this title); or

(5) is a product which was manufactured by a person who the Commission has informed the Secretary of the Treasury is in violation of subsection (g) of this section.

Samples

(b) The Secretary of the Treasury shall obtain without charge and deliver to the Commission, upon the latter's request, a reasonable number of samples of consumer products being offered for import. Except for those owners or consignees who are or have been afforded an opportunity for a hearing in a proceeding under section 2061 of this title with respect to an imminently hazardous product, the owner or consignee of the product shall be afforded an opportunity by the Commission for a hearing in accordance with section 554 of Title 5 with respect to the importation of such products into the customs territory of the United States. If it appears from examination of such samples or otherwise that a product must be refused admission under the terms of subsection (a) of this section, such product shall be refused admission, unless subsection (c) of this section applies and is complied with.

Modification

(c) If it appears to the Commission that any consumer product which may be refused admission pursuant to subsection (a) of this section can be so modified that it need not (under the terms of paragraphs (1) through (4) of subsection (a) of this section) be refused admission, the Commission may defer final determination as to the admission of such product and, in accordance with such regulations as the Commission and the Secretary of the Treasury shall jointly agree to, permit such product to be delivered from customs custody under bond for the purpose of permitting the owner or consignee an opportunity to so modify such product.

Supervision of modifications

(d) All actions taken by an owner or consignee to modify such product under subsection (c) of this section shall be subject to the supervision of an officer or employee of the Commission and of the Department of the Treasury. If it appears to the Commission that the product cannot be so modified or that the owner or consignee is not proceeding satisfactorily to modify such product, it shall be refused admission into the customs territory of the United States, and the Commission may direct the Secretary to demand redelivery of the product into customs custody, and to seize the product in accordance with section 2071(b) of this title if it is not so redelivered.

Product destruction

(e) Products refused admission into the customs territory of the United States under this section must be exported, except that upon application, the Secretary of the Treasury may permit the destruction of the product in lieu of exportation. If the owner or consignee does not export the product within a reasonable time, the Department of the Treasury may destroy the product.

Payment of expenses occasioned by refusal of admission

(f) All expenses (including travel, per diem or subsistence, and salaries of officers or employees of the United States) in connection with the destruction provided for in this section (the amount of such expenses to be determined in accordance with regulations of the Secretary of the Treasury) and all expenses in connection with the storage, cartage, or label with respect to any consumer product refused admission under this section, shall be paid by the owner or consignee and, in default of such payment, shall constitute a lien against any future importations made by such owner or consignee.

Importation conditioned upon manufacturer's compliance

(g) The Commisson may, by rule, condition the importation of a consumer product on the manufacturer's compliance with the inspection and recordkeeping requirements of this chapter and the Commission's rules with respect to such requirements.

§2067. EXEMPTION OF EXPORTS—RISK OF INJURY TO CONSUMERS WITHIN UNITED STATES

(a) This chapter shall not apply to any consumer product if (1) it can be shown that such product is manufactured, sold, or held for sale for export from the United States (or that such product was imported for export), unless (A) such consumer product is in fact distributed in commerce for use in the United States, or (B) the Commission determines that exportation of such product presents an unreasonable risk of injury to consumers within the United States, and (2) such consumer product when distributed in commerce, or any container in which it is enclosed when so distributed bears a stamp or label stating that such consumer product is intended for export; except that this chapter shall apply to any consumer product manufactured for sale, offered for sale, or sold for shipment to any installation of the United States located outside of the United States.

Statement of exportation; filing period, information; notification of foreign country; petition for minimum filing period; good cause

(b) Not less than thirty days before any person exports to a foreign country any product—

(1) which is not in conformity with an applicable consumer product safety standard in effect under this chapter, or

(2) which is declared to be a banned hazardous substance by a rule promulgated under section 2058 of this title,

such person shall file a statement with the Commission notifying the Commission of such exportation, and the Commission, upon receipt of such statement, shall promptly notify the government of such country of such exportation and the basis for such safety standard or rule. Any statement filed with the Commission under the preceding sentence shall specify the anticipated date of shipment of such product, the country and port of destination of such product, and the quantity of such product that will be exported, and shall contain such other information as the Commission may by regulation require. Upon petition filed with the Commission by any person required to file a statement under this subsection respecting an exportation, the Commission may, for good cause shown, exempt such person from the requirement of this subsection that such a statement be filed no less than thirty days before the date of the exportation, except that in no case shall the Commission permit such a statement to be filed later than the tenth day before such date.

§2068. PROHIBITED ACTS

(a) It shall be unlawful for any person to—

(1) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which is not in conformity with an applicable consumer product safety standard under this chapter;

(2) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which has been declared a banned hazardous product by a rule under this chapter;

(3) fail or refuse to permit access to or copying of records, or fail or refuse to establish or maintain records, or fail or refuse to make reports or provide information, or fail or refuse to permit entry or inspection, as required under this chapter or rule thereunder;

(4) fail to furnish information required by section 2064(b) of this title;

(5) fail to comply with an order issued under section 2064(c) or (d) of this title (relating to notification, to repair, replacement, and refund, and to prohibited acts);

(6) fail to furnish a certificate required by section 2063 of this title or issue a false certificate if such person in the exercise of due care has reason to know that such

certificate is false or misleading in any material respect; or to fail to comply with any rule under section 2063(c) of this title (relating to labeling);

(7) fail to comply with any rule under section 2058(d)(2) of this title (relating to stockpiling); or

(8) fail to comply with any rule under section 2062 of this title (relating to prior notice and description of new consumer products);

(9) fail to comply with any rule under section 2076(e) of this title (relating to provision of performance and technical data);

(10) fail to comply with any rule or requirement under section 2082 of this title (relating to labeling and testing of cellulose insulation); and

(10)(sic) fail to file a statement with the Commission pursuant to section 2067(b) of this title.

(b) Paragraphs (1) and (2) of subsection (a) of this section shall not apply to any person (1) who holds a certificate issued in accordance with section 2063(a) of this title to the effect that such consumer product conforms to all applicable consumer product safety rules, unless such person knows that such consumer product does not conform, or (2) who relies in good faith on the representation of the manufacturer or a distributor of such product that the product is not subject to an applicable product safety rule.

§2069 CIVIL PENALTIES

(a)(1) Any person who knowingly violates section 2068 of this title shall be subject to a civil penalty not to exceed $2,000 for each such violation. Subject to paragraph (2), a violation of section 2068(a)(1), (2), (4), (5), (6), (7), (8), (9), or

(10) of this title shall constitute a separate offense with respect to each consumer product involved, except that the maximum civil penalty shall not exceed $500,000 for any related series of violations. A violation of section 2068(a)(3) of this title shall constitute a separate violation with respect to each failure or refusal to allow or perform an act required thereby; and, if such violation is a continuing one, each day of such violation shall constitute a separate offense, except that the maximum civil penalty shall not exceed $500,000 for any related series of violations.

(2) The second sentence of paragraph (1) of this subsection shall not apply to violations of paragraph (1) or (2) of section 2068(a) of this title—

(A) if the person who violated such paragraphs is not the manufacturer or private labeler or a distributor of the products involved, and

(B) if such person did not have either (i) actual knowledge that his distribution or sale of the product violated such paragraphs or (ii) notice from the Commission that such distribution or sale would be a violation of such paragraphs.

(b) Any civil penalty under this section may be compromised by the Commission. In determining the amount of such penalty or whether it should be remitted or mitigated and in what amount, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty when finally determined, or the amount agreed on compromise, may be deducted from any sums owing by the United States to the person charged.

(c) As used in the first sentence of subsection (a)(1) of this section, the term "knowingly" means (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.

§2070. CRIMINAL PENALTIES

(a) Any person who knowingly and willfully violates section 2068 of this title after having received notice of noncompliance from the Commission shall be fined not more than $50,000 or be imprisoned not more than one year, or both.

(b) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of section 2068 of this title, and who has knowledge of notice of noncompliance received by the corporation from the Commission, shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a) of this section.

§2071. INJUNCTIVE ENFORCEMENT AND SEIZURE

(a) The United States district courts shall have jurisdiction to take the following action:

(1) Restrain any violation of section 2068 of this title.

(2) Restrain any person from manufacturing for sale, offering for sale, distributing in commerce, or importing into the United States a product in violation of an order in effect under section 2064(d) of this title.

(3) Restrain any person from distributing in commerce a product which does not comply with a consumer product safety rule.

Such actions may be brought by the Commission (without regard to section 2076(b)(7)(A) of this title) or by the Attorney General in any United States district court for a district wherein any act, omission, or transaction constituting the violation occurred, or in such court for the district wherein the defendant is found or transacts business. In any action under this section process may be served on a defendant in any other district in which the defendant resides or may be found.

(b) Any consumer product—

(1) which fails to conform with an applicable consumer product safety rule, or

(2) the manufacture for sale, offering for sale, distribution in commerce, or the importation into the United States of which has been prohibited by an order in effect under section 2064(d) of this title,

when introduced into or while in commerce or while held for sale after shipment in commerce shall be liable to be proceeded against on libel of information and condemned in any district court of the United States within the jurisdiction of which such consumer product is found. Proceedings in cases instituted under the authority of this subsection shall conform as nearly as possible to proceedings in rem in admiralty. Whenever such proceedings involving substantially similar consumer products are pending in courts of two or more judicial districts they shall be consolidated for trial by order of any such court upon application reasonably made by any party in interest upon notice to all other parties in interest.

§2072. SUITS FOR DAMAGES BY PERSONS INJURED

(a) Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent, subject to the provisions of section 1331 of Title 28 as to the amount in controversy, shall recover damages sustained, and may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2059(e)(4) of this title) and reasonable expert witnesses' fees.

(b) The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State law.

§2073. PRIVATE ENFORCEMENT

Any interested person may bring an action in any United States district court for the district in which the defendant is found or transacts business to enforce a consumer product safety rule or an order under section 2064 of this title, and to obtain appropriate injunctive relief. Not less than thirty days prior to the commencement of such action, such interested person shall give notice by registered mail to the Commission, to the Attorney General, and to the person against whom such action is directed. Such notice shall state the nature of the alleged violation of which the action will be brought. No separate suit shall be brought under this section if at the time the suit is brought the same alleged violation is the subject of a pending civil or criminal action by the United States under this chapter. In any action under this section the court may in the interest of justice award the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2059(e)(4) of this title) and reasonable expert witnesses' fees.

§2074. PRIVATE REMEDIES—LIABILITY AT COMMON LAW OR UNDER STATE STATUTE NOT RELIEVED BY COMPLIANCE

(a) Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person.

Evidence of Commission's inaction inadmissible in actions relating to consumer products

(b) The failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under State statutory law relating to such consumer product.

Public information

(c) Subject to sections 2055(a)(2) and 2055(b) of this title but notwithstanding section 2055(a)(1) of this title, (1) any accident or investigation report made under this chapter by an officer or employee of the Commission shall be made available to the public in a manner which will not identify any injured person or any person treating him, without the consent of the person so identified, and (2) all reports on research projects, demonstration projects, and other related activities shall be public information.

§2075. STATE STANDARDS

(a) Whenever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.

Consumer product safety requirements which impose performance standards more stringent than Federal standards

(b) Subsection (a) of this section does not prevent the Federal Government or the government of any State or political subdivision of a State from establishing or continuing in effect a safety requirement applicable to a consumer product for its own use which requirement is designed to protect against a risk of injury associated with the product and which is not identical to the consumer product safety standard applicable to the product under this chapter if the Federal, State, or political subdivision requirement provides a higher degree of protection from such risk of injury than the standard applicable under this chapter.

Exemptions

(c) Upon application of a State or political subdivision of a State, the Commission may by rule, after notice and opportunity for oral presentation of views, exempt from the provisions of subsection (a) of this section (under such conditions as it may impose in the rule) any proposed safety standard or regulation which is described in such application and which is designed to protect against a risk of injury associated with a consumer product subject to a consumer product safety standard under this chapter if the State or political subdivision standard or regulation—

(1) provides a significantly higher degree of protection from such risk of injury than the consumer product safety standard under this chapter, and

(2) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision standard or regulation on interstate commerce, the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such standard or regulation, the cost of complying with such standard or regulation, the geographic distribution of the consumer product to which the standard or regulation would apply, the probability of other States or political subdivisions applying for an exemption under this subsection for a similar standard or regulation, and the need for a national, uniform standard under this chapter for such consumer product.

§2076. ADDITIONAL FUNCTIONS OF CONSUMER PRODUCT SAFETY COMMISSION—AUTHORITY TO CONDUCT HEARINGS OR OTHER INQUIRIES

(a) The Commission may, by one or more of its members or by such agents or agency as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States. A Commissioner who participates in such a hearing or other inquiry shall not be disqualified solely by reason of such participation from subsequently participating in a decision of the Commission in the same matter. The Commission shall publish notice of any proposed hearing in the Federal Register and shall afford a reasonable opportunity for interested persons to present relevant testimony and data.

Commission powers

(b) The Commission shall also have the power—

(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine;

(2) to administer oaths;

(3) to require by subpena the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to accept gifts and voluntary and uncompensated

services, notwithstanding the provisions of section 665(b) of Title 31;

(7) to—

(A) initiate, prosecute, defend, or appeal (other than to the Supreme Court of the United States), through its own legal representative and in the name of the Commission, any civil action if the Commission makes a written request to the Attorney General for representation in such civil action and the Attorney General does not within the 45-day period beginning on the date such request was made notify the Commission in writing that the Attorney General will represent the Commission in such civil action, and

(B) initiate, prosecute, or appeal, through its own legal representative, with the concurrence of the Attorney General or through the Attorney General, any criminal action,

for the purpose of enforcing the laws subject to its jurisdiction;

(8) to lease buildings or parts of buildings in the District of Columbia, without regard to the Act of March 3, 1877 (section 34 of Title 40), for the use of the Commission; and

(9) to delegate any of its functions or powers, other than the power to issue subpenas under paragraph (3), to any officer or employee of the Commission.

Noncompliance with subpena or Commission order; contempt

(c) Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission (subject to subsection (b)(7) of this section) or by the Attorney General, in case of refusal to obey a subpena or order of the Commission issued under subsection (b) of this section, issue an order requiring compliance therewith; and any failure to obey the order of the court may be punished by the court as a contempt thereof.

Disclosure of information

(d) No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

Performance and technical data

(e) The Commission may by rule require any manufacturer of consumer products to provide to the Commission such performance and technical data related to performance and safety as may be required to carry out the purposes of this chapter, and to give such notification of such performance and technical data at the time of original purchase to prospective purchasers and to the first purchaser of such product for purposes other than resale, as it determines necessary to carry out the purposes of this chapter.

Purchase of consumer products by Commission

(f) For purposes of carrying out this chapter, the Commission may purchase any consumer product and it may require any manufacturer, distributor, or retailer of a consumer product to sell the product to the Commission at manufacturer's, distributor's, or retailer's cost.

Contract authority

(g) The Commission is authorized to enter into contracts with governmental entities, private organizations, or individuals for the conduct of activities authorized by this chapter.

Research, development, and testing facilities

(h) The Commission may plan, construct, and operate a facility or facilities suitable for research, development, and testing of consumer products in order to carry out this chapter.

Recordkeeping; audit

(i)(1) Each recipient of assistance under this chapter pursuant to grants or contracts entered into under other than competitive bidding procedures shall keep such records as the Commission by rule shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project undertaken in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(2) The Commission and the Comptroller General of the United States, or their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients that are pertinent to the grants or contracts entered into under this chapter under other than competitive bidding procedures.

Report to President and Congress

(j) The Commission shall prepare and submit to the President and the Congress at the beginning of each regular session of Congress a comprehensive report on the administration of this chapter for the preceding fiscal year. Such report shall include—

(1) a thorough appraisal, including statistical analyses, estimates, and long-term projections, of the incidence of injury and effects to the population resulting from consumer products, with a breakdown, insofar as practicable, among the various sources of such injury;

(2) a list of consumer product safety rules prescribed or in effect during such year;

(3) an evaluation of the degree of observance of consumer product safety rules, including a list of enforcement actions, court decisions, and compromises of alleged violations, by location and company name;

(4) a summary of outstanding problems confronting the administration of this chapter in order of priority;

(5) an analysis and evaluation of public and private consumer product safety research activities;

(6) a list, with a brief statement of the issues, of completed or pending judicial actions under this chapter;

(7) the extent to which technical information was disseminated to the scientific and commercial communities and consumer information was made available to the public;

(8) the extent of cooperation between Commission officials and representatives of industry and other interested parties in the implementation of this chapter, including a log or summary of meetings held between Commission officials and representatives of industry and other interested parties;

(9) an appraisal of significant actions of State and local governments relating to the responsibilities of the Commission; and

(10) such recommendations for additional legislation as the Commission deems necessary to carry out the purposes of this chapter.

(k)(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

Report to the House of Representatives and the Senate of proposed consumer product safety rule

(l)(1) Except as provided in paragraph (2)—

(A) the Commission shall transmit to the Committee on Commerce of the Senate and the Committee on Interstate and Foreign Commerce of the House of Representatives each consumer product safety rule proposed after May 11, 1976, and each regulation proposed by the Commission after such date under section 1261 or 1262 of this title, section 1472 of this title, or section 1198 of this title; and

(B) no consumer product safety rule and no regulation under a section referred to in subparagraph (A) may be adopted by the Commission before the thirtieth day after the date proposed rule or regulation upon which such rule or regulation was based was transmitted pursuant to subparagraph (A).

(2) Paragraph (1) does not apply with respect to a regulation under section 1261(q) of this title respecting a hazardous substance the distribution of which is found under paragraph (2) of section 1261(q) of this title to present an imminent hazard or a regulation under section 1262(e) of this title respecting a toy or other article intended for use by children the distribution of which is found under paragraph (2) of section 1262(e) of this title to present an imminent hazard.

Rules of Consumer Product Safety Commission; "rule" defined; study and report to Congress; impact analyses, other statements and materials, and noncompliance statement; deletion proposals; notification of Congress; review limitation; rulemaking record

(m)(1) For purposes of this subsection, the term "rule" means—

(A) any rule prescribed by the Commission pursuant to section 2058 of this title;

(B) any rule prescribed by the Commission pursuant to section 1261(q)(1)(B) of this title;

(C) any rule prescribed by the Commission under section 1472 of this title; and

(D) any rule prescribed by the Commission under section 1193 of this title.

(2) Within 18 months after the effective date of this subsection, the Commission shall begin a study of all the rules which the Commission has issued and which are in effect on such effective date. At the end of such 18-month period, the Chairman of the Commission shall submit a report to the Congress which shall, to the extent practicable and appropriate (taking into account the resources and priorities of the Commission)—

(A) recommend the deletion of particular rules and portions of rules, including reasons for such recommendations; and

(B) recommend the initiation of appropriate rulemaking proceedings under this Act to make changes or modifications in particular rules or portions of rules.

(3) In any case in which the Commission proposes to delete any rule or portion of a rule during the 18-month period specified in paragraph (2), the Commission shall notify each House of the Congress of such proposal at the time such proposal is published in the Federal Register.

(4)(A) To the extent practicable and appropriate (taking into account the resources and priorities of the Commission), the Chairman of the Commission shall include in the report submitted to the Congress under this subsection, for each rule which the Commission has issued and which is in effect on the effective date of this subsection—

(i) an economic impact analysis which takes into account, for such rule, the cost impact on and benefits to consumers and affected businesses (with particular attention to small businesses);

(ii) a paperwork impact analysis containing—

(I) an estimate of the numbers of, and a description of the classes of persons who are required to file reports, maintain records, and fulfill any of the information-gathering requirements under such rule;

(II) an estimate of the nature and amount of the information required to be filed in such reports, the frequency of such reports, the nature and number of records required to be kept by such persons, and the amount of time such persons would require, and the costs which would be incurred, to keep such records and make such reports; and

(III) a description of steps being taken by the Commission to ensure that there is no unnecessary duplication of recordkeeping and report filing resulting from such rule;

(iii) a judicial impact analysis showing the effect of such rule on the workload of the Federal courts; and

(iv) such other explanatory and supporting statements and materials as the Commission determines necessary and appropriate for congressional consideration of such report.

(B)(i) Except as provided in clause (ii), no material submitted to the Congress by the Chairman of the Commission under this paragraph shall be subject to any judicial review, including any judicial review to determine whether such material is sufficient to comply with the requirements of this paragraph. In the event the Chairman of the Commission finds that it is impractical or inappropriate to submit the information required under clauses (i) through (iii) of subparagraph (A), the Chairman of the Commission shall submit a statement as to why he cannot so comply.

(ii) If any material submitted to the Congress by the Chairman of the Commission, under this paragraph also is included in any rulemaking record of the Commission, any determination regarding whether such material is subject to judicial review in connection with any review of such rulemaking record shall not be affected by the submission of such material to the Congress under this paragraph.

§2077. PRODUCT SAFETY ADVISORY COUNCIL—ESTABLISHMENT; MEMBERSHIP

(a) The Commission shall establish a Product Safety Advisory Council which it may consult before prescribing a consumer product safety rule or taking other action under this chapter. The Council shall be appointed by the Commission and shall be composed of fifteen members, each of whom shall be qualified by training and experience in one or more of the fields applicable to the safety of products within the jurisdiction of the Commission. The Council shall be constituted as follows:

(1) five members shall be selected from governmental agencies including Federal, State, and local governments;

(2) five members shall be selected from consumer product industries including at least one representative of small business; and

(3) five members shall be selected from among consumer organizations, community organizations, and recognized consumer leaders.

Meetings

(b) The Council shall meet at the call of the Commission, but not less often than four times during each calendar year.

Proposal of consumer product safety rules

(c) The Council may propose consumer product safety rules to the Commission for its consideration and may function through subcommittees of its members. All proceedings of the Council shall be public, and a record of each proceeding shall be available for public inspection.

Compensation; travel pay

(d) Members of the Council who are not officers or employees of the United States shall, while attending meetings or conferences of the Council or while otherwise engaged in the business of the Council, be entitled to receive compensation at a rate fixed by the Commission, not exceeding the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule, including traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5. Payments under this subsection shall not render members of the Council officers or employees of the United States for any purpose.

§2078. COOPERATION WITH STATES AND OTHER FEDERAL AGENCIES

(a) The Commission shall establish a program to promote Federal-State cooperation for the purposes of carrying out this chapter. In implementing such program the Commission may—

(1) accept from any State or local authorities engaged in activities relating to health, safety, or consumer protection assistance in such functions as injury data collection, investigation, and educational programs, as well as

other assistance in the administration and enforcement of this chapter which such States or localities may be able and willing to provide and, if so agreed, may pay in advance or otherwise for the reasonable cost of such assistance, and

(2) commission any qualified officer or employee of any State or local agency as an officer of the Commission for the purpose of conducting examinations, investigations, and inspections.

(b) In determining whether such proposed State and local programs are appropriate in implementing the purposes of this chapter, the Commission shall give favorable consideration to programs which establish separate State and local agencies to consolidate functions relating to product safety and other consumer protection activities.

(c) The Commission may obtain from any Federal department or agency such statistics, data, program reports, and other materials as it may deem necessary to carry out its functions under this chapter. Each such department or agency may cooperate with the Commission and, to the extent permitted by law, furnish such materials to it. The Commission and the heads of other departments and agencies engaged in administering programs related to product safety shall, to the maximum extent practicable, cooperate and consult in order to insure fully coordinated efforts.

(d) The Commission shall, to the maximum extent practicable, utilize the resources and facilities of the National Bureau of Standards, on a reimbursable basis, to perform research and analyses related to risks of injury associated with consumer products (including fire and flammability risks), to develop test methods, to conduct studies and investigations, and to provide technical advice and assistance in connection with the functions of the Commission.

(e) The Commission may provide to another Federal agency or a State or local agency or authority engaged in activities relating to health, safety, or consumer protection, copies of any accident or investigation report made under this chapter by an officer, employee, or agent of the Commission only if (1) information which under section 2055(a)(2) of this title is to be considered confidential is not included in any copy of such report which is provided under this subsection; and (2) each Federal agency and State and local agency and authority which is to receive under this subsection a copy of such report provides assurances satisfactory to the Commission that the identity of any injured person and any person who treated an injured person will not, without the consent of the person identified, be included in—

(A) any copy of any such report, or

(B) any information contains in any such report, which the agency or authority makes available to any member of the public. No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section 2055(b) of this title.

§2079. TRANSFERS OF FUNCTIONS

(a) The functions of the Secretary of Health, Education and Welfare under the Federal Hazardous Substances Act and the Poison Prevention Packaging Act of 1970 are transferred to the Commission. The functions of the Secretary of Health, Education and Welfare under the Federal Food, Drug, and Cosmetic Act (15 U.S.C. 301 et seq.), to the extent such functions relate to the administration and enforcement of the Poison Prevention Packaging Act of 1970, are transferred to the Commission.

(b) The functions of the Secretary of Health, Education, and Welfare, the Secretary of Commerce, and the Federal Trade Commission under the Flammable Fabrics Act are transferred to the Commission. The functions of the Federal Trade Commission under the Federal Trade Commission Act, to the extent such functions relate to the administration and enforcement of the Flammable Fabrics Act, are transferred to the Commission.

(c) The functions of the Secretary of Commerce and the Federal Trade Commission under the Act of August 2, 1956, are transferred to the Commission.

(d) A risk of injury which is associated with a consumer product and which could be eliminated or reduced to a sufficient extent by action under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, or the Flammable Fabrics Act may be regulated under this chapter only if the Commission by rule finds that it is in the public interest to regulate such risk of injury under this chapter. Such a rule shall identify the risk of injury proposed to be regulated under this chapter and shall be promulgated in accordance with section 553 of Title 5; except that the period to be provided by the Commission pursuant to subsection (c) of such section for the submission of data, views, and arguments respecting the rule shall not exceed thirty days from the date of publication pursuant to subsection (b) of such section of a notice respecting the rule.

(e)(1)(A) All personnel, property, records, obligations, and commitments, which are used primarily with respect to any function transferred under the provisions of subsections (a), (b) and (c) of this section shall be transferred to the

Commission, except those associated with fire and flammability research in the National Bureau of Standards. The transfer of personnel pursuant to this paragraph shall be without reduction in classification or compensation for one year after such transfer, except that the Chairman of the Commission shall have full authority to assign personnel during such one-year period in order to efficiently carry out functions transferred to the Commission under this section.

(B) Any commissioned officer of the Public Health Service who upon the day before the effective date of this section, is serving as such officer primarily in the performance of functions transferred by this Act to the Commission, may, if such officer so elects, acquire competitive status and be transferred to a competitive position in the Commission subject to subparagraph (A) of this paragraph, under the terms prescribed in paragraphs (3) through (8)(A) of section 15(b) of the Clean Air Amendments of 1970.

(2) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Commission, by any court of competent jurisdiction, or by operation of law.

(3) The provisions of this section shall not affect any proceedings pending at the time this section takes effect before any department or agency, functions of which are transferred by this section; except that such proceedings, to the extent that they relate to functions so transferred, shall be continued before the Commission. Orders shall be issued

in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this section had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or repealed by the Commission, by a court of competent jurisdiction, or by operation of law.

(4) The provisions of this section shall not affect suits commenced prior to the date this section takes effect and in all such suits proceedings shall be had, appeals taken, and judgments rendered, in the same manner and effect as if this section had not been enacted; except that if before the date on which this section takes effect, any department or agency (or officer thereof in his official capacity) is a party to a suit involving functions transferred to the Commission, then such suit shall be continued by the Commission. No cause of action, and no suit, action, or other proceeding, by or against any department or agency (or officer thereof in his official capacity) functions of which are transferred by this section shall abate by reason of the enactment of this section. Causes of actions, suits, actions, or other proceedings may be asserted by or against the United States or the Commission as may be appropriate and, in any litigation pending when this section takes effect, the court may at any time, on its own motion or that of any party, enter an order which will give effect to the provisions of this paragraph.

(f) For purposes of this section, (1) the term "function" includes power and duty, and (2) the transfer of a function, under any provision of law, of an agency or the head of a department shall also be a transfer of all functions under such law which are exercised by any office or officer of such agency or department.

§2080. LIMITATIONS ON CONSUMER PRODUCT SAFETY COMMISSION'S JURISDICTION

The Commission shall have no authority under this chapter to regulate any risk of injury associated with a consumer product if such risk could be eliminated or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act of 1970; the Atomic Energy Act of 1954; or the Clean Air Act. The Commission shall have no authority under this chapter to regulate any risk of injury associated with electronic product radiation emitted from an electronic product (as such terms are defined by section 263c(1) and (2) of Title 42) if such risk of injury may be subjected to regulation under subpart 3 of part F of title III of the Public Health Service Act.

§2081. AUTHORIZATION OF APPROPRIATIONS

(a) There are authorized to be appropriated for the purposes of carrying out the provisions of this chapter (other than the provisions of section 2076(h) of this title which authorize the planning and construction of research, development, and testing facilities) and for the purpose of carrying out the functions, powers and duties transferred to the Commission under section 2079 of this title, not to exceed—

(1) $15,000,000 for the fiscal year ending June 30, 1976;

(2) $14,000,000 for the period beginning July 1, 1976, and ending September 30, 1976;

(3) $60,000,000 for the fiscal year ending September 30, 1977;

(4) $68,000,000 for the fiscal year ending September 30, 1978;

(5) $55,000,000 for the fiscal year ending September 30, 1979;

(6) $60,000,000 for the fiscal year ending September 30, 1980; and

(7) $65,000,000 for the fiscal year ending September 30, 1981.

(b)(1) There are authorized to be appropriated such sums as may be necessary for the planning and construction of research, development and testing facilities described in section 2076(h) of this title; except that no appropriation shall be made for any such planning or construction involving an expenditure in excess of $100,000 if such planning or construction has not been approved by resolutions adopted in substantially the same form by the Committee on Interstate and Foreign Commerce of the House of Representatives, and by the Committee on Commerce of the Senate. For the purpose of securing consideration of such approval the Commission shall transmit to Congress a prospectus of the proposed facility including (but not limited to)—

(A) a brief description of the facility to be planning or constructed;

(B) the location of the facility, and an estimate of the maximum cost of the facility;

(C) a statement of those agencies, private and public, which will use such facility, together with the contribution to be made by each such agency toward the cost of such facility; and

(D) a statement of justification of the need for such facility.

(2) The estimated maximum cost of any facility approved under this subsection as set forth in the prospectus may be

increased by the amount equal to the percentage increase, if any, as determined by the Commission, in construction costs, from the date of the transmittal of such prospectus to Congress, but in no event shall the increase authorized by this paragraph exceed 10 per centum of such estimated maximum cost.

(c) No funds appropriated under subsection (a) of this section may be used to pay any claim described in section 2053(h) of this title whether pursuant to a judgment of a court or under any award, compromise, or settlement of such claim made under section 2672 of Title 28, or under any other provision of law.

§2082. INTERIM CELLULOSE INSULATION SAFETY STANDARD— APPLICABILITY OF SPECIFICATION OF GENERAL SERVICES ADMINISTRATION: AUTHORITY AND EFFECT OF INTERIM STANDARD: MODIFICATIONS: CRITERIA: LABELING REQUIREMENTS

(a)(1) Subject to the provisions of paragraph (2), on and after the last day of the 60-day period beginning on the effective date of this section, the requirements for flame resistance and corrosiveness set forth in the General Services Administration's specification for cellulose insulation, HH-I-515C (as such specification was in effect on February 1, 1978), shall be deemed to be an interim consumer product safety standard which shall have all the authority and effect of any other consumer product safety standard promulgated by the Commission under this chapter. During the 45-day period beginning on the effective date of this section, the Commission may make, and shall publish in the Federal Register, such technical, nonsubstantive changes in such requirements as it deems appropriate to make such requirements suitable for promulgation as a consumer product safety standard. At the end of the 60-day period specified in the first sentence of this paragraph, the Commission shall publish in the Federal Register such interim consumer product safety standard, as altered by the Commission under this paragraph.

(2) The interim consumer product safety standard established in paragraph (1) shall provide that any cellulose insulation which is produced or distributed for sale or use as a consumer product shall have a flame spread rating of 0 to 25, as such rating is set forth in the General Services Administration's specification for cellulose insulation, HH-I-515C.

(3) During the period for which the interim consumer product safety standard established in subsection (a) of this section is in effect, in addition to complying with any labeling requirement established by the Commission under this chapter, each manufacturer or private labeler of cellulose insulation shall include the following statement on any container of such cellulose insulation: "ATTENTION: This material meets the applicable minimum Federal flammability standard. This standard is based upon laboratory tests only, which do not represent actual conditions which may occur in the home". Such statement shall be located in a conspicuous place on such container and shall appear in conspicuous and legible type in contrast by typography, layout, and color with other printed matter on such container.

Scope of judicial review

(b) Judicial review of the interim consumer product safety standard established in subsection (a) of this section, as such standard is in effect on and after the last day of the 60-day period specified in such subsection, shall be limited solely to the issue of whether any changes made by the Commission under paragraph (1) are technical, nonsubstantive changes. For purposes of such review, any change made by the Commission under paragraph (1) which requires that any test to determine the flame spread rating of cellulose insulation shall include a correction for variations in test results caused by equipment used in the test shall be considered a technical, nonsubstantive change.

Enforcement; violations; promulgation of final standard; procedures applicable to promulgation; revision of interim standard; procedures applicable to revision

(c)(1)(A) Any interim consumer product safety standard established pursuant to this section shall be enforced in the same manner as any other consumer product safety standard until such time as there is in effect a final consumer product safety standard promulgated by the Commission, as provided in subparagraph (B), or until such time as it is revoked by the Commission under section 2058(e) of this title. A violation of the interim consumer product safety standard shall be deemed to be a violation of a consumer product safety standard promulgated by the Commission under section 2058 of this title.

(B) If the Commission determines that the interim consumer product safety standard does not adequately protect the public from the unreasonable risk of injury associated with flammable or corrosive cellulose insulation, it shall promulgate a final consumer product safety standard to protect against such risk. Such final standard shall be promulgated pursuant to section 553 of Title 5, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation. The provisions of section 2058(b), (c), and (d) of this title shall apply to any proceeding to promulgate such final standard. In any judicial review of such final standard under section 2060 of this title, the court shall not require any demonstration that each particular finding made by the Commission under section 2058(c) of this title is supported by substantial evidence. The court shall affirm the action of the Commission unless the court determines that such action is not supported by substantial evidence on the record taken as a whole.

(2)(A) Until there is in effect such a final consumer product safety standard, the Commission shall incorporate into the interim consumer product safety standard, in accordance with the provisions of this paragraph, each revision superseding the requirements for flame resistance and corrosiveness referred to in subsection (a) of this section and promulgated by the General Services Administration.

(B) At least 45 days before any revision superseding such requirements is to become effective, the Administrator of the General Services Administration shall notify the Commission of such revision. In the case of any such revision which becomes effective during the period beginning on February 1, 1978, and ending on the effective date of this section, such notice from the Administrator of the General Services Administration shall be deemed to have been made on the effective date of this section.

(C)(i) No later than 45 days after receiving any notice under subparagraph (B), the Commission shall publish the revision, including such changes in the revision as it considers appropriate to make the revision suitable for promulgation as an amendment to the interim consumer product safety standard, in the Federal Register as a proposed amendment to the interim consumer product safety standard.

(ii) The Commission may extend the 45-day period specified in clause (i) for an additional period of not more than 150 days if the Commission determines that such extension is necessary to study the technical and scientific basis for the revision involved, or to study the safety and economic consequences of such revision.

(D)(i) Additional extensions of the 45-day period specified in subparagraph (C)(i) may be taken by the Commission if—

(I) the Commission makes the determination required in subparagraph (C)(ii) with respect to each such extension; and

(II) in the case of further extensions proposed by the Commission after an initial extension under this clause, such further extensions have not been disapproved under clause (iv).

(ii) Any extension made by the Commission under this subparagraph shall be for a period of not more than 45 days.

(iii) Prior notice of each extension made by the Commission under this subparagraph, together with a statement of the reasons for such extension and an estimate of the length of time required by the Commission to complete its action upon the revision involved, shall be published in the Federal Register and shall be submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Interstate and Foreign Commerce of the House of Representatives.

(iv) In any case in which the Commission takes an initial 45-day extension under clause (i), the Commission may not take any further extensions under clause (i) if each committee referred to in clause (iii) disapproves by committee resolution any such further extensions before the end of the 15-day period following notice of such initial extension made by the Commission in accordance with clause (iii).

(E) The Commission shall give interested persons an opportunity to comment upon any proposed amendment to the interim consumer product safety standard during the 30-day period following any publication by the Commission under subparagraph (C).

(F) No later than 90 days after the end of the period specified in subparagraph (E), the Commission shall promulgate the amendment to the interim consumer product safety standard unless the Commission determines, after consultation with the Secretary of Energy, that—

(i) such amendment is not necessary for the protection of consumers from the unreasonable risk of injury associated with flammable or corrosive cellulose insulation; or

(ii) implementation of such amendment will create an undue burden upon persons who are subject to the interim consumer product safety standard.

(G) The provisions of section 2060 of this title shall not apply to any judicial review of any amendment to the interim product safety standard promulgated under this paragraph.

Reporting requirements of other Federal departments, agencies, etc. of violations

(d) Any Federal department, agency, or instrumentality, or any Federal independent regulatory agency, which obtains information which reasonably indicates that cellulose insulation is being manufactured or distributed in violation of this chapter shall immediately inform the Commission of such information.

Reporting requirements of Commission to Congressional committees; contents, time of submission, etc.

(e)(1) The Commission, no later than 45 days after the effective date of this section, shall submit a report to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House of Representatives which shall contain a detailed statement of the manner in which the Commission intends to carry out the enforcement of this section.

(2)(A) The Commission, no later than 6 months after the date upon which the report required in paragraph (1) is due (and no later than the end of each 6-month period thereafter) shall submit a report to each committee referred to in paragraph (1) which shall describe the enforcement activities of the Commission with respect to this section during the most recent 6-month period.

(B) The first report which the Commission submits under subparagraph (A) shall include the results of tests of cellulose insulation manufactured by at least 25 manufacturers which the Commission shall conduct to determine whether such cellulose insulation complies with the interim consumer product safety standard. The second such report shall include the results of such tests with respect to 50 manufacturers who were not included in testing conducted by the Commission for inclusion in the first report.

Compliance with certification requirements; implementation; waiver; rules and regulations

(f)(1) The Commission shall have the authority to require that any person required to comply with the certification requirements of section 2063 of this title with respect to the manufacture of cellulose insulation shall provide for the performance of any test or testing program required for such certification through the use of an independent third party qualified to perform such test or testing program. The Commission may impose such requirement whether or not the Commission has established a testing program for cellulose insulation under section 2063(b) of this title.

(2) The Commission, upon petition by a manufacturer, may waive the requirements of paragraph (1) with respect to such manufacturer if the Commission determines that the use of an independent third party is not necessary in order for such manufacture to comply with the certification requirements of section 2063 of this title.

(3) The Commission may prescribe such rules as it considers necessary to carry out the provisions of this subsection.

Authorization of appropriations

(g) There are authorized to be appropriated, for each of the fiscal years 1978, 1979, 1980, and 1981, such sums as may be necessary to carry out the provisions of this section.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

Unit A

No. 80-1006

THE STATE FAIR OF TEXAS,
Plaintiff-Appellant,
Cross-Appellee,

STECK & STAPF ATTRACTIONS, INC.,
Plaintiff-Appellant,
Cross-Appellee,

versus

UNITED STATES CONSUMER
PRODUCT SAFETY COMMISSION,
Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court for the Northern District of Texas

(JUNE 30, 1981)

Before GOLDBERG, AINSWORTH, and RUBIN, Circuit Judges. RUBIN, Circuit Judge:

Among the attractions offered visitors to the State Fair of Texas is the opportunity to take a trip on the "Swiss Skyride." Skyride passengers travel in open gondolas, moving along a single cable, over the fairgrounds and enjoy a panoramic prospect. The Skyride is owned by the State Fair, but operated by Steck & Stapf Attractions, a lessee. Manufactured in Switzerland by Van Roll, Ltd., the attraction has been bought by several amusement parks around the country.

Two recent Skyride accidents, one occurring at the State Fair, prompted the United States Consumer Product Safety Commission to obtain an administrative search warrant authorizing an on-site inspection of the Skyride and an examination of relevant documents in the possession of the Fair and Steck & Stapf. The Fair and Steck & Stapf sued to prevent the Commission from conducting its investigation. Concluding that the Skyride is a "consumer product" within the meaning of the Consumer Product Safety Act, we uphold the Commission's authority to conduct the investigation.

I.

The accident at the State Fair occurred on October 21, 1979. Four gondolas collided, falling to the ground and killing one passenger. A similar accident at a Missouri amusement park had caused three fatalities and led to an investigation of this type of ride by the Consumer Product Safety Commission. As part of its investigation, the Commission served the State Fair with a notice of inspection [*see* 16 C.F.R. §1118.2 (1980)] seeking access to the Skyride and to relevant records. The State Fair and Steck & Stapf allowed a Commission engineer to view the ride from a distance, but would not allow him to inspect it more closely or to examine the documents.

To prevent further action by the Commission, the State Fair and Steck & Stapf filed separate suits, later consolidated, seeking a declaratory judgment that the Skyride is not a "consumer product" and, therefore, beyond the Commission's jurisdiction. They also sought an injunction against further Commission attempts to inspect the ride. Holding that no irreparable injury was threatened until the

Commission obtained a search warrant enabling it to disregard the plaintiffs' refusal to cooperate, the district court held that the controversy was not yet ripe for judicial decision. The court retained jurisdiction, anticipating the search warrant that was later issued by a federal magistrate. When they again refused to permit inspection, the Commission sought an order to show cause why it should not be permitted to conduct the inspection as the warrant authorized.

The district court affirmed the magistrate's denial of the injunctive relief sought by plaintiffs. In all other respects, however, plaintiffs were granted the relief sought. The district court affirmed the denial of the Commission's motion for an order to show cause, granted the plaintiffs' motion to quash the warrant, and entered a declaratory judgment in favor of plaintiffs. Plaintiffs' victory was nonetheless partial. The court held that the Skyride is a consumer product under the Act and granted plaintiffs relief only because the Commission had not presented sufficient facts establishing authority to enter the premises. *See* 15 U.S.C. §2065(a). The Commission could thus continue its investigation, although at a distance.

Neither side is content with this decision.[1] State Fair and

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[1] The judgment is final and appealable. The district court's statement that its dismissal of the Commission's suit was "without prejudice to further application for a warrant under other circumstances," State Fair of Texas v. United States Consumer Product Safety Commission, 481 F. Supp. 1070, 1082 (N.D. Tex. 1979), holding out the possibility of a subsequent suit unhindered by *res judicata*, did not rob the judgment entered of its finality in resolving all of the issues then before the court. *Cf.* F.T.C. v. Texaco, Inc. 517 F.2d 137, 143 n.6 (D.C. Cir. 1975, *cert. denied* 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977), holding that the mere possibility of reconsideration upon presentation of additional facts does not rob a judgment already entered of finality. *Compare* Broussard v. Lippman, 643 F.2d 1131 (5th Cir. 1981), in which a district court was held not final because it predicated entry of judgment upon the occurrence of a condition precedent.

Steck & Stapf challenge the characterization of the Skyride as a consumer product, while the Commission argues that it has authority to inspect the premises and records.

II.

To justify issuance of an administrative search warrant, the Commission must make some showing that it has statutory authority to conduct the investigation. Relying on Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), the district court concluded that the Commission "must be able to demonstrate its own jurisdiction." State Fair of Texas v. United States Consumer Product Safety Commission, 481 F. Supp. 1070, 1076 (N.D. Tex. 1979). The Commission, citing pre-*Barlow's* cases, argues that a reviewing court should assure itself only that statutory authority for the warrant is not obviously lacking. *See* American General Insurance Co. v. F.T.C., 496 F.2d 197, 200 (5th Cir. 1974).

The Fourth Amendment's prohibition of unreasonable searches and seizures applies to administrative searches as well as criminal investigations. Donovan v. Dewey, 49 U.S.L.W. 4748 (June 17, 1981); Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, ______ L.Ed.2d ______ (1967). *See* Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, ______ L.Ed.2d ______ (1967). In *Barlow's*, the Court held that, except in unusual circumstances, warrantless searches of commercial premises are inherently unreasonable and, therefore, interdicted by the Fourth Amendment. To secure a warrant, the agency must show "probable cause" that it should be issued. As Justice White noted, "[p]robable cause in the criminal sense is not required," 436 U.S. at 320-21, 98 S.Ct. at 1824, 56 L.Ed.2d at ______ , but the agency must show that:

> the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.

Id. at 323, 98 S.Ct. at 1826, 98 L.Ed.2d at ____. The plaintiffs contest only the Commission's statutory authority and do not challenge the constitutionality of the search or the existence of an appropriate administrative plan.

In deciding whether the district court properly granted plaintiffs' motion to quash the warrant, we must determine what showing of statutory authority is sufficient to justify issuance of a warrant. As with most Fourth Amendment issues, we determine the applicable standard by weighing the legitimate expectations of privacy regarding the object of the search against the level of intrusion on that privacy. Bell v. Wolfish, ____ U.S. ____, 99 S.Ct. 1861, ____ L.Ed.2d ____ (1979); Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, ____ L.Ed.2d ____ (1979); Wagner v. Bonner, 621 F.2d 675 (5th Cir. 1980).[2]

It follows that the balance may be different depending on the kind of property that is to be searched, the place where it is located, and the degree of intrusiveness the search entails. We put different considerations on the scales when we consider the examination of private papers and the inspection of property that is usually in plain view.

Both plaintiffs have a significant privacy interest in the documents that are in their respective possession because these materials are kept in a private file away from public view. We agree with the district court that a search warrant is "the most disruptive of the arrows in this investigatory quiver," State Fair of Texas v. United States Consumer Products Safety Commission, 481 F. Supp. at 1076, because the warrant would enable the inspectors to search these files for themselves. Accordingly, we hold that, in order to obtain a warrant for the documents, the Commission must demonstrate clear, not merely plausible, statutory authority.

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[2] See Donovan v. Dewey, 49 U.S.L.W. 4748 (June 17, 1981); Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Unlike the documents, the Skyride stands entirely visible to the public. What is in "plain view" receives little or no Fourth Amendment protection because the owner's expectation of privacy is minimal. Payton v. New York, _____ U.S. _____, 100 S.Ct. 1371, _____ L.Ed.2d _____ (1980); United States v. Jonas, 639 F.2d 200 (5th Cir. 1981). *See* Donovan v. Dewey, 49 U.S.L.W. 4748 (June 17, 1981) (Rehnquist, J., concurring). The Commission seeks only to examine the Skyride machinery more closely than a fairgoer could. We take judicial notice that some of the machinery may be shielded or enclosed for safety or functional purposes but the record contains no evidence that it is purposely hidden from public view. In the absence of a command to shut down the ride's operation, a warrant to examine its machinery has little disruptive effect on the owner's business and strips little, if any, secrecy cloak.[3] Inspection of the Skyride is, therefore, governed by the lesser standard: a warrant to inspect premises shielded by a minimal privacy interest need only be not "plainly incompetent to any lawful purpose." *See* Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509, 63 S.Ct. 339, 343, 87 L.Ed.2d 424, _____ (1943).

III.

The provisions of the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.* determine the Commission's authority to obtain a warrant to inspect the relevant documents. Concluding that the Commission clearly proved its statutory authority to conduct this search under the demanding standard applicable to the documents, we do not test its authority by the lesser standard applicable to the Skyride.

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[3] Barlow's, *See* and *Camara* all involved premises where the owner had a high expectation of privacy. *Barlow's* involved the company's "working area"; *See*, a warehouse; and *Camara*, an apartment. Our situation is analogous to an exception discussed in *Barlow's* and applied in Donovan v. Dewey. Like a pervasively regulated corporation, the owner and operator of the Skyride have consented to the constant examination of their premises by outsiders.

A. THE SKYRIDE IS A CONSUMER PRODUCT

The Act covers more than toasters and other small household appliances. Congress defined the term "consumer product" expansively to include any article, or component part thereof, produced or distributed

> (i) *for sale* to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or
>
> (ii) *for the personal use*, consumption, or enjoyment, of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; . . . .[4]

15 U.S.C. § 2052(a)(1) (emphasis supplied).

The statute thus embraces not only merchandise produced "for sale to a consumer," but also those articles that consumers do not ordinarily buy, but nonetheless use. The hallmark of the Commission's authority is not the customer's legal relation to a product, but the consumer's physical exposure to it. *See* H. R. Rep. No. 92-1153, 92d Cong., 2d Sess. 27 (1972); Consumer Product Safety Commission v. Chance Manufacturing Co., 441 F. Supp. 228, 233 (D.C.D.C. 1977).

The term "personal use" is, of course, modified. The article must be produced for use "in or around a . . . household or residence, a school, in recreation or otherwise." When the entire second paragraph of the definition is read literally, it encompasses the Skyride; the Skyride is an "article . . . produced or distributed . . . for the personal use . . . or enjoyment . . . of a consumer . . . in recreation." The House Report accompanying the Act substantiates this interpretation. It states that Subpart (ii) "also" includes:

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[4] The statute then lists nine classes of exceptions to this inclusive language. See 15 U.S.C. § 2052(2) (1)(A)-(I).

> products which are primarily or exclusively sold to industrial or institutional buyers ... so long as they were produced for the *use* of consumers.

H.R. Rep. No. 92-1153, 92 Cong. 2d Sess. 27 (1972) (emphasis and ellipsis in the oriqinal).

Of courts, plaintiffs challenge this reading,[5] but we cannot ignore the usual significance of the language employed, the legislative history of subpart (ii) and the broad remedial policy underlying the Act.

1. The Skyride is an "Article"

Steck & Stapf argues that the Skyride is not an "article" because it is too large to be exchanged between consumers.

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[5] The complexity of this issue may be inferred from the lack of consensus among those judges who have already considered it. Two judges have decided that the Skyride is a consumer product and a third would reach the same conclusion. *See* Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission, 484 F. Supp. 1221 (N.D. Okla. 1980), *rev'd*, 645 F.2d 26 (10th Cir. 1981) (Wienshienk, J., dissenting); State Fair of Texas v. United States Consumer Product Safety Commission, 481 F. Supp. 1070 (N.D. Tex. 1979), *rev'd on other grounds* herein. *See* also Consumer Product Safety Commisson v. Chance Manufacturing Co., 441 F. Supp. 228 (D.C.D.C. 1977), holding that the "Zipper," an amusement park ride, is a consumer product. Three judges have held that the Skyride is not a consumer product. *See* majority opinion of two judges in Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission, 645 F.2d 26 (10th Cir. 1981); Walt Disney Productions v. United States Consumer Product Safety Commission, No. 79-0170-LEW(Px) (S.D. Cal. April 18, 1979), *rev'd on other qrounds*, No. 80-1006 (9th Cir. May 4, 1981).

The only authority cited to support this extremely limited interpretation is *Webster's* definition of an article as a "commodity." *Webster's New World Dictionary* 42 (1969). If *Webster's* definition is controlling, it designates the Skyride. The Skyride is certainly a commodity, a tangible item capable of being sold. Moreover, *Webster's* also defines commodity as "article of commerce." If there be a distinctive difference between the words, we are unable to discern it. That Congress found it necessary to exempt aircraft and boats from the definition of consumer product, 15 U.S.C. §2052(a)(1)(F)-(G), indicates that size is not a defining limitation of the term "article."[6] Be it ever so large, the Skyride is an article.

2. The Skyride is "Distributed"

The State Fair contends that the Skyride is not "distributed" because it is not customarily sold directly to consumers. This argument is answered by the words of the provision to which the Fair alludes. Section 2052(a)(1)(A), describing the first of the nine excepted classes of products excludes from the Commission's authority:

> any article which is *not customarily* produced or *distributed for* sale to, or *use* or consumption by, *or enjoyment of*, a consumer." (Emphasis supplied)

15 U.S.C. § 2052(a)(1)(A). We have no cause to ignore the unaccommodating words italicized; the Skyride has been "customarily" distributed — to amusement parks — for "use ... or enjoyment of" consumers.

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[6] The Congressional purpose in using "article" was identified by Judge Leventhal in Consumer Product Safety Commission v. Anaconda Co., 591 F.2d 1314, 1319 (D.C. Cir. 1979):

> Congress contemplated an object produced or distributed as a distinct article of commerce, rather than any physical entity that might exist only at an intermediate stage of production.

ASG Industries, Inc. v. Consumer Product Safety Commission, 593 F.2d 1323 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 864, 100 S.Ct. 133, ____ L.Ed.2d ____ (1979), and Consumer Product Safety Commission v. Anaconda Co., 593 F.2d 1314 (D.C. Cir. 1979), cited by the State Fair, are not to the contrary. Each turns on the court's conclusion that housing is not a consumer product. *ASG* involved architectural glazing materials, while *Anaconda* involved aluminum wiring circuits, both products incorporated into housing. Consumers do not "use" these products until they have been incorporated into the exempted structure and are no longer used separately from their use as part of the whole. In both cases, however, Judge Leventhal noted that products "customarily . . . used by consumers" are not exempted. *ASG*, 593 F.2d at 1328; *Anaconda*, 593 F.2d at 1322. *See* Kaiser Aluminum & Chemical Corp. v. United States Consumer Product Safety Commission, 574 F.2d 178 (3d Cir. 1978), *cert. denied*, 439 U.S. 881, ____ S.Ct. ____, ____ L.Ed.2d ____ (1978).[7]

The language of Section 2052(a)(1)(A) is unambiguous. *ASG*, *Anaconda* and *Kaiser* confirm that a product customarily distributed for use by consumers is not exempt from the Commission's authority.

3. The Skyride is Used By Consumers.

The statutory phrase "for the personal use, consumption or enjoyment of the consumer" poses perhaps the most difficult question of interpretation raised by the congressional definition of consumer product. In the common sense of the word, consumers "use" the Skyride, in that they "enjoy, hold, occupy, or have some manner of benefit" from the product. *Black's Law Dictionary* 1710 (4th ed. 1968) (defining "Non-technical Sense"). *See* 2 E. Weekly, *An Etymological Dictionary of Modern English* 1574 (1967). Taking the term as defined in *Webster's Seventh New Collegiate Dictionary* 973 (1965), a common desk-top reference book, the passenger "avail[s] oneself of" the ride, for "use implies availing oneself of as a means to an end." Not only do passengers literally occupy the Skyride, but they also enjoy it for sightseeing and benefit from being transported.

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[7] In *Kaiser*, the Third Circuit, using a different analysis, held that aluminum wiring circuits were customarily used by consumers and were not excepted under Section 2052(a)(1)(A).

Steck & Stapf argues that, because consumers do not exercise control over the particular gondola in which they ride, they do not "use" the Skyride. Surprisingly, two courts have accepted this argument. *See* Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission, 645 F.2d 26, 29 (10th Cir. 1981); Walt Disney Productions v. United States Consumer Product Safety Commission, No. 79-0170-LEW(Px), slip op. at 6 (D.C. Cal. April 18, 1979), *rev'd on other grounds*, No. 79-3435 (9th Cir. April 22, 1981). Neither opinion cites any legislative history to support such a narrow and unusual reading of "use" in contradiction to the common understanding of its meaning. One court has found that no evidence supports their interpretation. Consumer Product Safety Commission v. Chance Manufacturing Co., 441 F. Supp. 228, 233 (D.C.D.C. 1977).

If we created this requirement *sua sponte*, we would also ignore that portion of the House Report including as consumer products those products sold to institutions for the use of consumers The power of consumers to control articles sold to and owned by an institution will usually be limited.[*]

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[*] Consider, for example, a glass basketball backboard sold only to schools and arenas. Players have no "control" over the backboard, yet face a significant risk of injury if the glass plate shatters easily.

Precisely because they cannot control the product, consumers may face even greater risks of injury. It certainly becomes more difficult for them to determine for themselves the risks posed by its use. In the absence of any evidence of a contrary congressional intent, we cannot assume that Congress excluded products falling within the language of the statute and contemplated by the legislative history.

We are more troubled by an apparent redundancy in the definition. We find it difficult to imagine a product "sold" to consumers, but not "used" by them.[9] Even the restrictive definitions urged by State Fair and Steck & Stapf do not eliminate this redundancy. Ordinarily, we avoid treating statutory language as surplusage. Ideal Mutual Insurance Co. v. C.D.I. Construction Inc., 640 F.2d 654, 658 n.7 (5th Cir. 1981). In this instance, however, Congress may have tolerated tautology. The Senate version of the Consumer Product Safety Act limited its definition to products "sold" to consumers.[10] The House bill also used the language now constituting subpart (i), but added the additional language regarding "personal use" embodied in subpart (ii).[11] In its desire for "an assurance of comprehensiveness," *ASG Industries*, 593 F.2d at 1328, the House employed its more "broadly stated" definition, H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 27 (1972), without considering to what degree it overlapped the Senate definition. *See id.* The effort to avoid lacunae by seeking embraciveness may easily result in overlapping coverage. Without any evidence that Congress, in passing the House version, intended "sold" to have independent significance, we decline to fabricate a tortured distinction.

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[9] In *ASG* and *Anaconda*, Judge Leventhal found that homeowners did not directly use architectural glazing materials and aluminum circuits sold to the homebuilder. In holding that consumers customarily bought the former and remanding for a finding whether they used the latter, he did not negate the possibility that consumers who bought these products used them.

[10] S. 3419, 92d Cong., 2d Sess. § 101 (1972). The district court in *Walt Disney Productions* erroneously relied on the report accompanying this bill. *See* slip. op. at 5, *citing* S. Rep. No. 92-749, 92d Cong., 2d Sess. (1972).

[11] H.R. 15003, 92d Cong., 2d Sess. § 3.

4. The Skyride is Used in Recreation

Both plaintiffs assert that the Skyride is used only as a means of transportation, not as a form of recreation. The district court found that the ride was "intended for the enjoyment of recreation-minded consumers." 481 F. Supp. at 1077. Plaintiffs have not shown that this finding is clearly erroneous. *See* Robert K. Bell Enterprises, Inc. v. United States Consumer Product Safety Commission, 484 F. Supp. 1221, 1225 (N.D. Okla. 1980), *rev'd on other grounds*, 645 F.2d 26 (10th Cir. 1981), which quotes promotional literature describing the Skyride as "an attraction in itself."

The plaintiffs then pose a more challenging argument. They construe "in recreation" to modify the immediately preceding language rather than to provide an additional basis for considering an item as a consumer product. The relevant portion of Section 2052(a)(1)(ii) states that a consumer product is used, enjoyed or consumed:

> in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. . . .

This interpretation reads the phrase "in recreation" to refer only to household or school products used "in recreation [ ] or otherwise." Plaintiffs urge that, if "in recreation" provides an independent basis whereby a product becomes "consumer," then the word "otherwise" also provides an independent basis whereby the statute includes every product imaginable. (Plaintiffs provide a parade of spectres for our edification.) Further, according to the plaintiffs, the references to "household or residence" would be rendered surplusage, subsumed by "otherwise."

With the court in *Chance Manufacturing*, we find this interpretation "unduly strained." 441 F. Supp. at 233. The insertion of a comma after "recreation" indicates that the word was part of the preceding series, rather than functioning with "otherwise" as an independent adjectival phrase and thus limiting "consumer products" to those used in recreation or otherwise in a household, residence or school. Further evidence that use "in recreation" provides a separate basis for including a product comes from the list of exceptions to Section 2052(a)(1)'s definition of "consumer product." That Congress explicitly exempted aircraft and boats, *see* 15 U.S.C. § 2052(a)(1)(F)-(G), indicates congressional belief that these products, having no connection with school or household, would otherwise have fallen within the general definition.

We imply no insight as to the precise meaning of the term "otherwise" in this context. As a matter of diction, it is not redundant with the items in the preceding series because, by definition, it refers only to "other" items. However, we are not required to read this statute as if it were a wonderfully constructed jig-saw puzzle, with each word having only one precise place, yielding, when assembled, an unambiguous picture. The statute was not so constructed, as the leqislative history indicates. It seems likely that "otherwise" was inserted as "an assurance of comprehensiveness," to use Judge Leventhal's phrase. *ASG*, 593 F.2d at 1328. This case does not require us to announce that any non-industrial product[12] posing hazards to individuals constitutes a consumer product. That issue is simply not before us because the Skyride falls within one of the stated bases of the the Commission's jurisdiction.

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[12] *See* H.R. Rep. 92-1153, 92d Cong., 2d Sess. 27, stating that "industrial products" are excluded.

5. Other Statutory Provisions Do Not Compel Plaintiffs' Interpretation

The Act authorizes the Commission to acquire free samples of imported consumer products and purchase domestic consumer products at cost. *See* 15 U.S.C. § 2066, 2076. Steck & Stapf argues that, because the Commission is unlikely to acquire the Skyride in either manner, the ride is not a consumer product.[13] We find this argument unpersuasive. Both sections are permissive; they enable the Commission to obtain sample products, but do not suggest that the Commission's jurisdiction is limited to products that it may thus acquire. Such a limitation would be puzzling. The Commission will usually be fiscally unable to acquire products as expensive or as large as the Skyride. Yet large and costly products pose hazards to consumers indistinguishable from the hazards posed by those that are small and inexpensive.[14] Absent legislative history or other explicit evidence that Congress intended this distinction, we refuse to read it into the statute.

Both plaintiffs argue that the narrower definition of "consumer product" in the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, control the definition contained in Section 2052(a)(1). The Warranty Act defines consumer product "for the purposes of this chapter" as:

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[13] This argument found favor in California. *See* Walt Disney Productions v. United States Consumer Product Safety Commission, No. 79-0170-LEW(Px), (S.D. Cal. April 18, 1979) *rev'd on other grounds*, No. 80-1006 (9th Cir. May 4, 1981).

[14] That Congress found it necessary to exempt airplanes from Section 2052(a)(1)'s definition of consumer product suggests that neither cost nor size, of themselves, exclude a produce.

> tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes.

15 U.S.C. § 2301(1). Unlike the Consumer Product Safety Act, the Warranty Act is concerned with fraud, the release of financial information, and contractual rights. Because the Warranty Act is concerned only with household products actually sold to consumers, Congress consciously chose to employ a more limited definition. Two acts with different purposes need not be construed *in pari materia*. United Shoe Workers v. Bedell, 506 F.2d 174, 188-89 & n.96 (D.C. Cir. 1974); Latimer v. Sears Roebuck & Co., 285 F.2d 152, 157 (5th Cir. 1960).

Steck & Stapf also cites definitions of "consumer product" in the Fair Packaging and Labeling Act, *see* 15 U.S.C. 1459(a), and the Energy Policy and Conservation Act, *see* 42 U.S.C. § 6291 (a)(1). In each of these statutes, Congress has chosen to use the same term, "consumer product," but to define it differently in each instance. Each definition reflects the basic concerns of the legislation in which it is found. Without any evidence that these different definitions are interrelated, we refuse to assume that each of these different definitions has the same meaning. Indeed, if we did, we would have difficulty deciding which definition controls the others. We conclude that none of the provisions suggested by plaintiffs were limit Section 2052(a)(1)'s definition of "consumer product."

6. The Legislative History of the Act Does Not Exclude the Skyride

Both plaintiffs rely on legislative history indicating that Congress was concerned with the hazards posed by small household products to argue that Congress was concerned only with small products. *See, e.g.*, 118 Cong. Rec. 21847

(1972) (remarks by Sen. Percy); *id.* at 31375 (remarks by Cong. Staggers). Without doubt, many congressmen spoke primarily in terms of small household products when discussing the Act. Their statements, while addressing a central concern, do not purport to describe the limits of the Act's reach. The language of Section 2052(a)(1) suggests a much broader scope. A small facet of a larger problem will frequently capture the attention of Congress. Even though much of its discussion may involve the aspect that initially gained congressional attention, Congress, in the end, frequently passes a statute dealing comprehensively with the larger problem.[15] Lacking specific evidence that the expansion of Congressional concern embodied in Section 2052(a)(1)'s language is only apparent, we must give full effect to the language as written. A statute governs all of the circumstances falling within its purview, not only those that prompted its enactment. F.T.C. v. Jim Walter Corp., _____ F.2d _____ (5th Cir. 1981).

We find the House Report statement that the statute includes "products sold to ... institutional buyers ... for *use* of consumers," quoted *supra*, more probative of congressional intent. Unlike the comments cited by the plaintiffs, this language deals directly with the limits of Section 2052(a)(1)'s definition of consumer product, as does the Report's exhortation that we construe the definition broadly. On balance, the legislative history favors the conclusion that the Skyride does not transcend the periphery of the Commission's expansive domain.

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[15] Section 1983 of the Civil Rights Acts, 42 U.S.C. § 1983, provides an illustration of the paradigm. Although enacted in response to persecution of blacks during Reconstruction, it applies to every deprivation of constitutional rights under color of state law. *See, e.g.*, Mitchum v. Foster, 407, U.S. 225, 238-242, 92 S.Ct. 2160-62, 32 L.Ed.2d 705, _____ – _____ (1972); Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, _____ L.Ed.2d _____ (1961).

7. The Policy of the Act Favors Inclusion of the Skyride as a Consumer Product

In 15 U.S.C. § 2051, Congress specified the findings and purposes underlying the Act. These statements announce a broad remedial purpose. In addition, several bear specifically on the question before us. The primary justification for creating the Commission is expressed in the second finding.

> (a) The Congress finds that—
>
> (2) complexities of consumer products and the diverse natures and abilities of the consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately.

15 U.S.C. § 2051(a)(2). If small household appliances pose risks beyond the ability of the average consumer to evaluate, a large and far more complicated machine like the Skyride may pose even greater hazards, yet consumers have neither the technical expertise nor any real opportunity to evaluate the risks involved. In reality, only the institutional purchaser can effectively inquire into the risks posed by a product like the Skyride. The House Report statement that the statute includes products bought by institutions for consumer use indicates that Congress was unwilling to rely on the institutional buyer alone to ensure that consumers do not face unreasonable risks.

The fourth finding states that local government regulation of unreasonable risks posed by consumer products is "inadequate." 15 U.S.C. §2051(a)(4). This disposes of plaintiffs' contention that Dallas Building Code regulations governing the Skyride exempt the product from the Commission's authority.[16]

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[16] That the regulations are found in a building code does not transform the Skyride into a house. (In *Anaconda*, the court held that housing was not a consumer product under the Act. *See* 593 F.2d at 1320.) We take judicial notice that a Skyride is not a home.

The Act's "purposes" also favor inclusion of the Skyride.

> (b) The purposes of this chapter are—
>
> (1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations;
>
> (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

15 U.S.C. § 2501(b). An effective Commission investigation improving the safety of the Skyride would serve each of these ends. The relevance of the fourth finding is especially obvious. Consumers have died while using the Skyride; the protection of others who may use them cannot be assured by awaiting a personal injury action to determine fault. The manufacturers and owners whose products have already been involved in serious injuries to consumers bear an especially heavy burden in arguing that the Commission lacks jurisdiction.[17]

That burden has not been carried here. We hold that the Skyride is a "consumer product."

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[17] In Walt Disney Productions v. United States Consumer Product Safety Commission, No. 79-0170-LEW(Px) (S.D. Cal. April 18, 1979) *rev'd on other grounds*, No. 80-1006 (9th Cir. May 4, 1981), the district court saw the underlying policy considerations differently.

> Too expansive a reading of the Act's definition of a "consumer product" could result in the Commission spreading its limited resources too thinly, and might rob consumers of specialized agency expertise that Congress has attempted to guarantee.

Slip op. at 6-7. However, it is not the courts' prerogative to second-guess agency decisions properly within their discretion. Oilfield Safety and Machine Specialities, Inc. v. Harman Unlimited, Inc., 625 F.2d 1248, 1254 (5th Cir. 1980). The Commission is the best judge of what it should accomplish with the means given it by Congress.

B. THE COMMISSION IS AUTHORIZED TO ENTER THE FAIR GROUNDS

The other statutory issue before us requires less explication. Section 2065(a)(2) of the Act authorizes the Commission

> to inspect, at reasonable times and in a reasonable manner such conveyance or those areas of such factory, warehouse, or establishment where such products are manufactured, held, or transported and which relate to the safety of such products.

15 U.S.C. § 2065(a)(2). Section 2052(a)(8) defines manufactured as "to manufacture, produce, or assemble." 15 U.S.C. § 2052(a)(8). The district court concluded that, because neither of the plaintiffs fabricated or assembled the product, the Commission was not authorized to enter their premises.

Under the two sections, however, the Commission's authority depends not on who assembled (and thus "manufactured") the product, but on where the product was assembled. *Accord*, Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission, 484 F. Supp. 1221, 1228 (N.D. Okla. 1980), *rev'd on other grounds*, 645 F.2d 26 (10th Cir. 1981). Section 2065(a) speaks of "*areas* ... where such products are manufactured." The Skyride was necessarily assembled at the site of the fair, which provides the only location where the Commission may observe the product in action. Whenever a product can be assembled only on the purchaser's site, the Commission must either have the authority to inspect the functioning product there or be in most circumstances unable to inspect it at all. No legislative history mandates that we so limit the Commission's authority. We hold that the Commission may enter plaintiffs' premises to inspect the Skyride and to examine documents.

IV.

Concluding that the Commission had authority to inspect the Skyride and relevant documents, we grant the following relief:

1. The district court's decision denying plaintiffs injunctive relief is AFFIRMED.
2. The declaratory judgment entered in favor of plaintiffs is VACATED.
3. The district court's decision granting plaintiffs' motion to quash the administrative search warrant is REVERSED.
4. The district court's decision denying the Commission's motion for an order to show cause is VACATED, the issue now being moot in the light of this opinion.

No. 80-1006 — THE STATE FAIR OF TEXAS,
STECK & STAPF ATTRACTIONS, INC. *v.*
UNITED STATES CONSUMER PRODUCT
SAFETY COMMISSION

AINSWORTH, Circuit Judge, dissenting:

Despite the carefully articulated reasons set forth in the majority opinion which holds that an aerial tramway in an amusement park is within the jurisdiction of the Consumer Product Safety Commission under the Consumer Product Safety Act of 1972, 15 U.S.C. § 2051 *et seq.* (the Act), I continue to believe that the language of the Act itself, interpreted by taking the words as they are commonly and ordinarily understood, as well as the legislative history, dictate the conclusion that the aerial tramway is not a consumer product and not under the Act. Consequently, I dissent.

Whether or not the aerial tramway known as the Skyride is a consumer product, under the jurisdiction of the Act, hinges specifically on the interpretation of the words of Section 2052(a)(1) which defines that term as follows:

> The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—
>
> (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer . . . ."

Plaintiffs state (referring to subsection ii) that if each of the four phrases (1) "in or around a permanent or temporary household or residence," (2) "a school," (3) "in recreation," and (4) "or otherwise" provide independent bases of jurisdiction, as the majority now holds, the Act's jurisdiction extends to the entire universe of articles produced for the use or enjoyment of consumers. Thus, under the majority's interpretation, the Act's jurisdiction is virtually limitless in this context. It is true that "or otherwise" is a broad and all-inclusive term, but the phrase "in recreation, or otherwise" should be construed to modify the preceding words "household or residence, a school." Unless such modification is accepted, there can be no sensible reason for Congress including the home and school use provisions which would be mere surplusage under the majority's interpretation since the "or otherwise" term is without restriction.

The Tenth Circuit analyzed the identical statute in Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission, 645 F.2d 26, 29 (10th Cir. 1981), and concluded that the term "in recreation, or otherwise" did, indeed, modify the home and school use provisions in subsection ii. In my view, this is a more reasonable and proper construction and I apply it here.

The legislative history of the Act supports the view that consumer products should be restricted to those used at home or at school. In the section of the House Report entitled Basis for Legislation, the Committee made specific reference to the home or household five times in the space of two and one-half pages. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 21-24 (1972). More importantly, the House Report stated, "Within the last six years, the Congress has exhibited an increasing concern with the safety of the products which consumers encounter in their daily lives." In contrast, although many people ride the Skyride each year, it can hardly be said that an aerial tramway at the State Fair of Texas is the type of product which consumers encounter in their daily lives.[1]

I dissent.

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[1] There is no absence of governmental regulation of the State Fair grounds. Safety of the buildings and structure has been provided for since 1941 under the Dallas City Code. *See* Dallas City Code art. 96-1 *et seq*. (1941); Dallas City Code § 32-12 *et seq*. (1961).

APPENDIX C

ROBERT K. BELL ENTERPRISES, INC.,
an Oklahoma corporation

Plaintiff-Appellant,

v.

CONSUMER PRODUCT SAFETY COMMISSION, a Commission of the United States Government; Susan King, Chairman of the Consumer Product Safety Commission; Frank B. Pipkin, Chief of the Hazard Correction Branch of the Product Defect Correction Division of the Consumer Product Safety Commission, Defendants — Appellees.

No. 80-1382.

United States Court of Appeals, Tenth Circuit.

Argued June 20, 1980.
Decided March 27, 1981.
Rehearing Denied May 11, 1981.

SETH, Chief Judge.

This appeal is taken from a summary judgment for the Consumer Product Safety Commission, and the denial of a motion for summary judgment of appellant Bell Enterprises, Inc.

The basic issue on appeal is whether plaintiff's aerial tramway used as an amusement park ride, is a "consumer product" within the meaning of the Consumer Product Safety Act, 15 U.S.C. §2051 *et seq.*

After an accident involving an amusement park tramway in Texas the Commission began an investigation of such rides. The "Skyride" here concerned is an aerial cable tram of a type in general use in amusement parks. The Commission sent a letter to Bell Enterprises in Tulsa, Oklahoma, requesting information on the Skyride it was operating in its amusement park. This letter asked a series of questions concerning the business of Bell Enterprises and suggested that a failure to provide information could subject Bell to "penalties" up to $500,000.00, and an individual could be subjected to criminal penalties. The letter so attempted to be persuasive.

Bell Enterprises thereafter filed this suit seeking a declaratory judgment that the Consumer Product Safety Act is unconstitutional insofar as its investigatory authority is concerned, and that the Act is inapplicable to amusement Parks and amusement park rides. The Commission a few days after suit was filed issued a Special Order and Subpoena for Production of Documents. Both sides moved for summary judgment. The court held that the Skyride was a consumer product over which the Commission had jurisdiction, and that Bell's Fourth Amendment rights were not violated. Bell has taken this appeal.

On this issue whether the Skyride or similar rides are "consumer products" within the meaning of the Act, several courts have considered the problem and reached different results. *See State Fair of Texas v. Consumer Products Safety Commission*, 481 F.Supp. 1070 (N.D.Tex.); *Consumer Product Safety Commission v. Chance Mfg. Co.*, 441 F.Supp. 228 (D.D.C.); *Walt Disney Productions v. Consumer Product Safety Commission*, No. 79-0170-LEW (Px)(C.D. Cal.).

The Act, 15, U.S.C. §2051 *et seq.*, was enacted after two or three years of hearings and extended investigations. The history is long even before the legislation was considered by Congress, and the consideration during formal proceedings in Congress was extensive. We cannot herein describe but very limited portions of this history and only as it concerns the definitions and exclusions.

The term "consumer product" is defined in the Act at 15 U.S.C. §2052(a)(1) as follows:

> "The term 'consumer product' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—
>
> > "(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer . . . ."

It appears from the legislative history that the (i) phrase was the original or early version and (ii) was added later when consideration was given to distribution of articles to consumers not by sale but by gift, promotional samples, etc. In view of this legislative history it appears best to consider the definition as it was originally constructed and before the concern arose that consumers might also be subjected to dangers from articles which had not been produced or distributed "for sale." Thus considering (i) above, the phrase is directed to the type or kind of articles which are produced or distributed for sale to a consumer. This is a direct, uncomplicated definition, a practical test, and of relatively easy application to the vast number of articles as to which the hearings were directed. This is where the concern was, and it is apparent why those articles were initially described as "household" items.

Then with the concern over distribution to consumers of articles as free samples on approval, on lease, on loan, etc., the second clause (ii) was added. This was added to include distribution to consumers of the same things but without a sale, and thereby to include articles produced or distributed "for the personal use, consumption or enjoyment of a consumer." This with (i) was to cover all types of distribution.

The legislative history is clear as to the reason why (ii) was added. In the construction of the definition as a whole it must be assumed that (ii) was added for the purpose stated without an intention to enlarge the definition to include articles which were not included in (i).

Since (ii) was added to cover all manner of distribution and for this alone, we should attach no significance to the addition of the word "personal" in (ii). Thus "personal" use in (ii) is no different under this view than "to a consumer for use" in (i).

If the definition is considered as outlined above, and this would appear to be in accordance with its structure and terms and with the legislative history, there is no room for the all-inclusive coverage urged by the Commission in its complete reliance on (ii). The coverage so urged is basically that any article which the consumer enjoys is a consumer product.

Instead, the meaning of the (i) phrase must be regarded as controlling, not the "enjoyment" in (ii).

In *ASG Industries v. Consumer Product Safety Commission*, 593 F.2d 1323 (D.C.Cir.), the product considered was glazing material used in doors. The court there rejected the Commission's position that clause (ii) had extended the (i) definition. The court said, at 1328:

> "As we brought out in *Anaconda*, clauses (i) and (ii) of the definition were designed to ensure that the term 'consumer product' would encompass the various modes of distribution through which consumers acquire products and are exposed to the risks of injury associated with those products—not only direct sale transactions, covered by clause (i), but also any lease, promotional gift, or purchase by an institution, for consumer use, covered by clause (ii).

In considering the definition further another and separate aspect becomes significant. It should be noticed that in (i), as well as in (ii), the description changes *within each phrase* from one directed to *place* of use to *how* the article is used. Since this division or contrast is evident and was repeated, it is of importance. The "where" element—any article produced or distributed for use "in or around a . . . household, or residence," and the "how" element—for use "in recreation, or otherwise," are separately stated. Thus the articles are those produced or distributed for use (ordinarily) at the places stated although they may be used elsewhere from time to time. They are articles produced (ordinarily) for the purposes or uses stated.

The definition at §2052(a)(1) obviously required a great amount of thought, consideration, and condensation. Any analysis of it must be done with that in mind. Thus the use *place* and the use *purpose* are each stated and are repeated. Both must be met in view of the way in which the definition is constructed.

The purposes for production to identify the article appear again in the exception in the (A) subdivision. 15 U.S.C. §2052 (a)(1)(A). This exception uses a customarily produced or distributed test. This excludes articles not "customarily produced or distributed for sale to . . .," and again as to items not sold, "or use or consumption by, or enjoyment of, a consumer." The exclusion repeats to a large extent, but an exclusion *in a definition* is a device to clarify what has been affirmatively stated. The exclusion here does add the "customarily" produced phrase which is of some significance in construing phrase (i) to clarify it, and also to exclude industrial articles. The court in *Consumer Product Safety Commission v. Anaconda Co.*, 593 F.2d 1314 (D.C.Cir.), considered this exception clause, (a)(1)(A), and gave emphasis to the customarily produced language. The court there said, at 1322:

> "Jurisdiction does not require a showing that a majority of product sales are to consumers, but there must be a significant marketing of the product as a distinct article of commerce for sale to consumers or for the use of consumers before the product may be considered as 'customarily' produced or distributed in that manner."

The "customarily" language in the exception is important and would not permit the inclusion of an article *customarily* sold to an industrial or commercial enterprise which had the *exclusive* control and possession of the article in its use. In *Anaconda*, the court was considering wire used for household wiring. The court held that "consumer products" are those "customarily sold or otherwise distributed to consumers," and required more than an occasional sale. The court remanded the case for a determination whether wiring systems are bought separately by consumers. This factor was considered to be of basic importance. Some of the essential portions of the legislative history of the Act are described in the *Anaconda* opinion, and need not be repeated here. The separately sold to consumers aspect of *Anaconda* we also consider to be a factor to be considered here.

The definition in 15 U.S.C. §2052(a)(1), of course, directs the search to articles for consumers' use. This "use" reference is central to the whole Act, and it contains an implication that for the article to be used, and when used, it must ordinarily be under the control and direction of the user. The control and possession must be factors of some weight to be used in reaching a decision as to whether an article is a consumer product. The trial court in its decision that the Skyride was a consumer product placed reliance on *Consumer Product Safety Commission v. Chance Mfg. Co.*, 441 F.Supp 228 (D.D.C.), which also concerned an amusement park ride. The court in *Chance* held that use "in recreation" was a category separate from "household" use, and that the exposure to danger was an important factor to Congress. The trial court in the case before us determined that the ride was used for amusement purposes, thus in "recreation." The trial court also relied on *State Fair of Texas v. Consumer Products Safety Commission*, 481 F.Supp. 1070 (N.D.Tex.), hereinafter discussed. The Texas District Court in *State Fair of Texas* (now on appeal) held that an aerial tramway was a consumer product. The court reached this result by concluding that "[t]he ride was . . . produced 'for the personal use . . . or enjoyment' of consumers 'in recreation,"' and that this was sufficient. The court also held that "in recreation" did not modify the preceding phrase "in or around . . . a household."

In *Walt Disney Productions v. Consumer Product Safety Commission*, No. 79-0170-LEW (Px)(C.D.Cal.) (now on appeal), the trial court held that a Skyride was not a consumer product. The court relied on 15 U.S.C. §§2066(b) and 2076(f) providing that free samples of the products be provided the Commission and that the Commission could purchase the product at cost. The court concluded that this could not possibly apply to the Skyride and the article was not within the Act.

In cases dealing with articles other than rides, the court in *Kaiser Aluminum & Chemical Corp. v. Consumer Product Safety Commission*, 574 F.2d 178 (3rd Cir.), considered aluminum wiring and held it was a consumer product, as it is an article produced or distributed for the personal use or enjoyment of consumers. In *Southland Mower v. Consumer Product Safety Commission*, 619 F.2d 499 (5th Cir.), the court held that lawn mowers are governed by CPSC safety standards if they are customarily produced or distributed for sale to, or use or consumption by, or enjoyment of a consumer. We would agree that a lawn mower is for the "use" of consumers, but whether "enjoyment" is an appropriate term would seem to require some further consideration.

The extent to which an individual might be exposed to an article or its dangers as a test suggested in some opinions would not seem to provide a test implied in the statutory definition. It appears also that such an extent test would not be usefully exclusive.

When we look at the several significant indicators in the wording of the Act, and thus to consider:

1. the contents of clause (i) separately from clause (ii), and not regarding (ii) as an expansion of (i),
2. weight to be given to the use "where" and the use "purpose" distinction,
3. the "customarily" produced as a narrowing factor derived from the exclusion (A) with the separately sold element,
4. the control-possession by use with the listed items excepted,

we must conclude that the Skyride here concerned was not a "consumer product" as defined in the Act.

The judgment of the trial court is set aside, and the case is remanded for entry of judgment on Plaintiff's motion for summary judgment.

WEINSHIENK, District Judge, dissenting:

As I am unable to concur with the majority's reading of the statute, the legislative history, or the relevant case law, I respectfully dissent.

I.

The principal issue in this appeal is whether plaintiff's aerial tramway is a "consumer product" within the meaning of the Consumer Product Safety Act (CPSA), 15 U.S.C. §2051 *et seq*. The operative language is contained in the definitional section of the statute, 15 U.S.C. §2052(a):

> (1) The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the

> personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—
>
> (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer . . . .

In order to satisfy the definition, a product must be (a) any article or component thereof; (b) produced or distributed either (i) for sale to a consumer, or (ii) "for the . . . use . . . of a consumer;" and (c) intended for use "in or around a permanent or temporary household or residence, a school, in recreation or otherwise." As there is no dispute that the aerial tramway is "an article" within the meaning of this section, I will limit my analysis to the other two defitional requirements.

1. MODES OF DISTRIBUTION

I would agree that the legislative history reveals that clause (i) alone constituted the original proposed definition of "consumer product." Report of the Senate Committee on Commerce on CPSC, S.Rep.No.92-749, 92d Cong., 2d Sess.(1972), S. 3419, Section 101(1), at 42. However, in my view, the legislative history does not support the majority's conclusion that clause (ii) was added to "include distribution to consumers of the *same things* [as clause (i) includes] but without a sale . . . ." Majority opinion, p. 28 (emphasis added). In analyzing the original proposed definition, clause (i), the Senate Committee specifically indicated that it intended the definition to extend to products distributed free of charge. The Committee's report states that "[t]o qualify as a 'consumer product' therefore, the product must be one capable of production or distribution for sale to an individual but it is not necessary that the product actually be sold." S.Rep.No.92-749 at 12.

When clause (ii) was added to the definition, the legislative intent was to expand the coverage of clause (i). The Report of the House Committee on Interstate and Foreign Commerce on CPSA, H.R.Rep.No.92-1153, 92d Cong., 2d Sess. (1972), which accompanied the modified, and ultimately adopted, version of the definition, clearly states this purpose:

> Special attention should be paid to the use of the phrase: "produced or distributed for sale to ***or for the use of**a consumer." It is not necessary that a product be actually sold to a consumer, but only that it be produced or distributed for his use. Thus products which are manufactured for lease and products distributed without charge (for promotional purposes or otherwise) are included within the definition and would be subject to regulation under this bill. Also, products which are primarily or exclusively sold to industrial or institutional buyers would be included within the definition of consumer product so long as they were produced or distributed for *use* of consumers.

Id. at 27 (emphasis and ellipsis in original). Hence, the legislators' expressed intent, in amending the definition to include clause (ii), was to extend the Act's coverage to products principally sold to "industrial or institutional buyers"' so long as they were produced or distributed for use of consumers. As this second class of products is not necessarily co-extensive with the class designated by clause (i), clause (ii) cannot be read to include only products which are "produced or distributed for sale to consumers."

The House Committee's interpretation of the "industrial product" exception, 15 U.S.C. §2052(a)(1)(A), lends additional support to this analysis. According to the committee report,

> It is not intended that true "industrial products" be included within the ambit of the Product Safety Commission's authority. Thus, your committee has specifically excluded products which are not *customarily* produced or distributed for sale to or use of consumers. The occasional use would not be sufficient to bring the product under the Commission's jurisdiction. The term 'customarily' should not be interpreted as intending strict adherence to a quantum test, however. Your committee is aware that some products which were initially produced or sold solely for industrial application have often become broadly used by consumers. If the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are thereby exposed to hazards associated with the product.

H.R.Rep.No.92-1153 at 27 (emphasis in original). Thus, clause (ii) and the "industrial product" exception together comprise the legislators, response to the question of inclusion of quasi-consumer/quasi-industrial products under the definition of "consumer product." Methods of production or distribution were rejected as the touchstone for coverage, and instead, the functional criteria of "use of consumers" and "significant number of consumers . . . exposed to hazards associated with the product" were adopted. If, as its report indicates, the House Committee intended loss of the industrial product "claim for exclusion" to result "if the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers . . . [and] a significant number of consumers are thereby exposed to hazards associated with the product," then, a fortiori, the exception is also inapplicable when the manufacturer or distributor of a product sells it to industrial buyers solely for the use of consumers. In this case, Bell is such an "industrial buyer" because it is engaged in the recreation industry and it purchased the Skyride from the Swiss manufacturer for the ultimate recreational use of consumers.

In my view, the court's opinion in *ASG Industries v. Consumer Product Safety Commission*, 593 F.2d 1323 (D.C.Cir.1979), does not constitute a rejection of the Commission's position that clause (ii) expands the coverage of clause (i). The language of the *ASG* opinion upon which the majority relies on page 28 of their opinion includes the statement that clause (ii) covers products purchased by an institution for consumer use. Therefore, the *ASG* opinion can be read to support the interpretation that clause (ii) covers some products which are not covered by clause (i).

2. Place or Purpose of Use

I would also find that plaintiff's aerial tramway satisfies the second requirement for classification as a "consumer product," that is, use "in or around a permanent or temporary household or residence, a school, in recreation, or otherwise." As the Circuit Court of Appeals for the District of Columbia steted in *ASG*, "[t]his enumeration of locations and activities in which a consumer product may be used is not a limitation on jurisdiction, but rather an assurance of comprehensiveness." 593 F.2d at 1328. It is noteworthy that, in support of this interpretation, the court cited *Consumer Product Safety Commission v. Chance Manufacturing Co.*, 441 F.Supp. 228, 231-234 (D.D.C.1977), for the proposition that the phrase "in recreation or otherwise" does not restrict the location where consumer products are used to residences and schools. 593 F.2d at 1328, n. 16. Because the statutory language utilizes the word "or" rather than "and," I cannot concur in the majority's view that the use *place* and the use *purpose* (i.e., home or school and "in recreation or otherwise" respectively) must both be met. Rather, I would hold that the phrase "in recreation or otherwise" establishes an independent basis for Commission jurisdiction, and that, plaintiff's aerial tramway meets this definitional criterion. See also *State Fair of Texas v. Consumer Products Safety Commission*, 481 F.Supp. 1070, 1077 [N.D.Tex.1979).

In conclusion, I would hold that plaintiff's aerial tramway is a "consumer product" within the meaning of 15 U.S.C. §2052(a)(1) and that it does not fall within the exception in 15 U.S.C. §2052 (a)(1)(A).

II.

In light of my conclusion that plaintiff's Skyride is a "consumer product" within the meaning of 15 U.S.C. §2052, I reach the question of the constitutionality of the Act's apparent authorization of warrantless "constructive searches" and of the Commission's investigative efforts.

In *Marshall v. Barlow's Inc.*, 436 U.S.307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), the Supreme Court held that the Fourth Amendment requires an administrative agency to obtain a warrant before entering the premises of one who refuses to consent to a warrantless entry. However, the Court also noted that, despite statutory authorization of a warrantless search, if the agency actually obtains process which satisfies the Fourth Amendment, the searches under the statute are permissible. 436 U.S. at 325, n. 23, 98 S.Ct. at 1827, n. 23. The subpoena enforcement proceedings in this case provide the same check on abuse of agency power as does an administrative search warrant. Each process affords an opportunity for judicial review before governmental invasion of one's privacy, and the standard for enforcement of the subpoena does not substantively differ from that required for the issuance of a warrant. Compare *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357,368, 94 L.Ed. 401(1950), and *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 254-255, 13 L.Ed.2d 112 (1964) with *Marshall v. Barlow's Inc.*, 436 U.S. at 320, 98 S.Ct. at 1824 and *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727,1735, 18 L.Ed.2d 930 (1967). Therefore, neither the Act nor the Commission's investigative efforts pursuant to it violate Bell's Fourth Amendment rights.

I would affirm the District Court's ruling that Bell lacks standing to challenge the constitutionality of the statutory provisions which authorize civil and criminal sanctions. The commission's reference, in its initial letter to Bell, to possible sanctions does not constitute a threat of imminent and immediate prosectuion and hence, does not establish "real and immediate" injury or threat of injury. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669,675, 38 L.Ed.2d 674 (1974); *Golden v. Zwickler*, 394, U.S. 103,109,89 S.Ct. 956,960, 22 L.Ed.2d 113 (1969). Like the plaintiffs in *O'Shea*, Bell is asking us to "anticipate whether and when [it] will be charged with [a prohibited act] and will be made to appear [to answer the charges]. . . ." 414 U.S. at 497, 94 S.Ct. at 676. Because the alleged harm is too remote and speculative, Bell does not have standing to mount a constitutional attack on these statutory provisions.

For the above reasons, I would affirm the decision of the District Court.

Opposition

Office Supreme Court, U.S.
FILED
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Nos. 81-384 and 81-555

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE FAIR OF TEXAS, PETITIONER

v.

UNITED STATES CONSUMER PRODUCT
SAFETY COMMISSION

STECK & STAPF ATTRACTIONS, INC., PETITIONER

v.

UNITED STATES CONSUMER PRODUCT
SAFETY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE CONSUMER PRODUCT SAFETY COMMISSION

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MEMORANDUM FOR THE CONSUMER PRODUCT SAFETY COMMISSION

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1. Petitioner in No. 81-384, State Fair of Texas, owns an amusement park ride known as the "Skyride." Petitioner in No. 81-555, Steck & Stapf Attractions, Inc., is a licensee of State Fair and is responsible for operating and maintaining the Sky-

ride. The Skyride is permanently installed on the grounds of State Fair; passengers travel over the amusement park grounds in open gondolas attached to a single moving cable (81-384 Pet. App. B-1).

On October 21, 1979, four of State Fair's Skyride gondolas collided and fell to the ground; one passenger was killed. A similar accident at an amusement park in Missouri had caused three deaths and prompted an investigation of the Skyride by the Consumer Product Safety Commission. As part of its investigation, the Commission served State Fair with a notice of inspection (see 16 C.F.R. 1118.2) seeking access to the Skyride and to pertinent records. Petitioners allowed a Commission engineer to view the ride from a distance, but would not allow him to inspect it or to examine the documents (81-384 Pet. App. B-2).

To prevent further action by the Commission, State Fair and Steck & Stapf filed separate suits seeking a declaratory judgment that the Skyride is not a "consumer product" within the meaning of Section 3(a)(1) of the Consumer Product Safety Act (15 U.S.C. 2052(a)(1)) and is therefore outside the Commission's jurisdiction. They also sought injunctions against further Commission attempts to inspect the ride. In the meantime, the Commission obtained an administrative search warrant. Petitioners nonetheless refused to permit inspection and State Fair moved to quash the warrant; the Commission sought an order to show cause why petitioners should not be held in contempt (81-384 Pet. App. B-2 to B-3; App., *infra*, 2a-3a).

Although holding that the Skyride is a "consumer product" within the meaning of Section 3(a)(1) of the Act (App., *infra*, 12a-16a), the district court concluded that "the Commission ha[d] not yet shown [that it could] inspect the ride in the hands of State Fair and [Steck and Stapf]" (*id.* at 24a). Accordingly, the district court granted the motion to quash the warrant, but denied petitioners' other claims for relief and the Commission's request for a show cause order (*id.* at 26a; but see 81-384 Pet. App. B-3).

The court of appeals affirmed in part and reversed in part (81-384 Pet. App. B-1 to B-21). After thoroughly reviewing the language and legislative history of the Consumer Product Safety Act (*id.* at B-6 to B-19), the court of appeals sustained the district court's conclusion that the Skyride is a "consumer product" within the meaning of the Act. However, it rejected the district court's conclusion that the Commission had failed to establish its statutory authority to inspect the Skyride and relevant documents in this case. Accordingly, the court of appeals affirmed the denial of petitioner's request for injunctive relief and reversed the grant of petitioner State Fair's motion to quash the warrant (81-384 Pet. App. B-21).

2. Six weeks after the court of appeals' decision in this case, President Reagan signed the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (August 13, 1981). Section 1213 of the Act amends the Consumer Product Safety Act by excluding from the definition of "consumer product" fixed-site amusement park rides (95 Stat. 724; emphasis added):

> Section 3(a)(1) (15 U.S.C. 2052(a)(1)), is amended by inserting before the sentence following subparagraph (I) the following: "Such term includes any mechanical device which carries or

> conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site. *Such term does not include such a device which is permanently fixed to a site.*"

3. There is a clear conflict between the Fifth Circuit's decision in this case and the Tenth Circuit's decision in *Robert K. Bell Enterprises* v. *Consumer Product Safety Commission*, 645 F.2d 26 (1981), as to whether the Skyride is a "consumer product" within the meaning of the Act. In light of the unequivocal mandate of Section 1213 of the Omnibus Budget Reconciliation Act of 1981, however, the Commission has abandoned its investigation of the Skyride. This case is therefore moot. The conflict between the Fifth and Tenth Circuits has been legislatively resolved, and is of no future significance.

Since this Court might have granted the petitions if intervening events had not rendered this case moot, it is appropriate to grant the petitions, vacate the judgment of the court of appeals, and remand for dismissal of the complaints. *See, e.g., United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1981

APPENDIX A

UNITED STATES DISTRICT COURT
N. D. TEXAS
DALLAS DIVISION

No. CA-3-79-1367-G

THE STATE FAIR OF TEXAS

v.

UNITED STATES CONSUMER PRODUCTS
SAFETY COMMISSION

Nov. 13, 1979

MEMORANDUM ORDER

PATRICK E. HIGGINBOTHAM, District Judge.

As anticipated by the court in its memorandum order of November 3, 1979, the substantive issues presented by this case, left undecided by the court's earlier decision, have again come before the court, this time ripe for resolution. In its earlier memorandum order, the court denied the application of plaintiff, The State Fair of Texas ("State Fair") for a preliminary injunction restraining the defendant, United States Consumer Product Safety Commission ("Commission") from conducting an investigation of an accident involving defendant's aerial tramway which occurred on October 21, 1979. In so doing, the court held that State Fair was not threatened with irreparable injury, inasmuch as it could legally refuse permission for an inspection of the tramway and related records, forcing the Commission to obtain an administrative inspection warrant if it wished to inspect. In light of the probability that such a warrant would be sought, the court declined to dismiss the case as unripe, choosing instead to retain jurisdiction of the underlying claim for declaratory relief until events transpired which brought those issues squarely into focus. Such an occasion has now arisen.

On November 5, 1979, the Commission sought and obtained an *ex parte* administrative inspection warrant from United States Magistrate William F. Sanderson, Jr. That warrant, based upon affidavits from Commission personnel reciting the need for an inspection and stating that permission for a warrantless inspection had been refused, authorized the Commission to enter the premises of State Fair and of its licensee, Steck & Stapf Attractions, Inc. ("S & S"), and to inspect the tramway and its components in a nondestructive manner. The warrant also authorized inspection of nine categories of books and records within the possession, custody, or control of State Fair. The warrant was served on State Fair and S & S officials the same day, and those officials on advice of counsel refused entry pursuant to the warrant. On November 6, the Commission moved before Magistrate Sanderson for an order requiring State Fair and S & S to show cause why they should not be held in contempt. Simultaneously, State Fair moved before the magistrate to quash the warrant, asserting, as it had earlier before this court, that the Commission's jurisdiction to conduct inspections does not extend to products such as the aerial tramway or entities such as State Fair. In the interest of judicial economy, both motions were transferred to this court by the magistrate.[1] While these activities were taking place before the magistrate, a separate action was commenced by plaintiff Steck and Stapf Attractions, Inc., the operator of the tramway under a license agreement with State Fair. S & S sought injunctive relief against the Commission's planned inspection insofar as it involved records and tramway components in the possession or under the control of S & S.[2] That action, initially assigned to Judge Barefoot Sanders, was transferred to this court and consolidated with the present action by order of Judge Sanders on November 6.[3]

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[1] The action before the magistrate, styled *In re Establishment Inspection of State Fair of Texas and Steck and Stapf*

The basic facts which underlie this action were set forth in the court's memorandum order of November 3. Since that time, the parties have supplemented the record by means of numerous affidavits and stipulations. Such additional and undisputed facts as are required for decision of this case will be set forth in the body of this opinion.

I. *Congressional Authorization of Applications for Warrants*

It is necessary at the outset to deal with the contention made by the State Fair that the Consumer Product Safety Act, even if arguably applicable, does not authorize issuance of an administrative inspec-

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Attractions, Inc., Magistrate's Docket No. 3-79-132M, was consolidated with this action by order of this court dated November 8, 1979, and without objection of the parties.

[2] The claim with respect to records was dropped after it was determined that no records were sought from S & S by the Commission.

[3] The S & S action was styled *Steck & Stapf Attractions, Inc.* v. *United States Consumer Product Safety Commission*, Civil Action No. CA-3-79-1388-H.

tion warrant.[4] In so arguing, State Fair relies heavily on the recent case of *Marshall* v. *Gibson's Products, Inc.*, 584 F.2d 688 (5th Cir. 1978). That case was an action brought by the Secretary of Labor seeking a mandatory injunction to require an employer to submit to a warrantless inspection under the Occupational Safety and Health Act ("OSHA"). The court of appeals held that 29 U.S.C. § 657(a)(1), which authorizes the Secretary to conduct inspections similar in nature to those which the Commission may conduct under 15 U.S.C. § 2065(a), provided no implicit basis of jurisdiction for the action, and that jurisdiction could not be sustained under the Secretary's regulations or under general statutory grants of jurisdiction.

In contrast with the relief sought in *Gibson's*, the relief sought by the Commission in this case takes the form of an administrative inspection warrant rather than a mandatory injunction. In the case of *Marshall* v. *Shellcast Corp.*, 592 F.2d 1369 (5th Cir. 1979), which extended the *Gibson's* holding to an action seeking an injunction requiring compliance with an administrative inspection warrant, the court expressly noted that "the provision or preclusion of jurisdiction for the issuance of search warrants is quite a different matter from the provision or preclusion of jurisdiction for an injunction." 592 F.2d at 1371 n.3. The court cited Congressional concern over the constitutionality of OSHA, together with the Supreme Court's decision in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (nonconsensual warrantless searches under OSHA are unconstitutional), as "argu[ing] strongly for the position that federal courts do have jurisdiction to issue OSHA search warrants." 592 F.2d at 1370-71 n.3. Indeed, this court has expressly so held with respect to OSHA warrants. *Marshall* v. *Huffhines Steel Co.*, 478 F.Supp. 986 (N.D.Tex., 1979) (order denying motion to dismiss). It must be presumed that Congress possessed similar concerns over the constitutionality of the Consumer Product Safety Act, and hence that Act must be regarded as an implied basis of jurisdiction for actions seeking warrants under the Act. A contrary holding would render 15 U.S.C. § 2065 a nullity, since the Commission would be unable to obtain a warrant and yet could not inspect without a warrant by virtue of *Barlow's*.

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[4] This argument was first made at a very late stage of the proceedings and notwithstanding the fact that State Fair had expressly conceded such authority at the hearing held by the court on November 6. While the court would ordinarily not consider arguments raised under such circumstances, the doctrine that lack of subject matter jurisdiction may not be waived by the parties, and must be noted by the court *sua sponte* if necessary, is sufficiently implicated that the argument will be addressed. *See Marshall* v. *Gibson's Products, Inc.*, 584 F.2d 668, 672 (5th Cir. 1978).

A further basis for the decision in *Gibson's* was provided by the language of OSHA itself. Although several sections of OSHA gave the district courts jurisdiction in specific instances, that Act contained no grant of general authority to the Secretary of Labor to bring suit under its provisions. While the Solicitor of Labor was authorized to appear on behalf of the Secretary "in any civil litigation brought under [OSHA]," *see* 29 U.S.C. § 663, the court held that this provision did not expand the category of, suits which the Secretary could bring. It accordingly failed to find jurisdiction of the suit under 28 U.S.C. § 1345 as a civil action commenced by an officer or agency of the United States "expressly authorized to sue by Act of Congress." 584 F.2d at 676-77.

The provisions of OSHA, authorizing suit only in specific instances, stand in stark contrast to those of the Consumer Product Safety Act. 15 U.S.C. § 2076 (b)(7) authorizes the Commission "to initiate, prosecute, defend, or appeal . . ., through its own legal representative and in the name of the Commission, *any civil action* . . . for the purpose of enforcing the laws subject to its jurisdiction," if the Attorney General does not assume responsibility for conducting the action in the Commission's behalf (emphasis supplied).[5] Hence the Commission fits squarely within the language of 28 U.S.C. § 1345 as an agency "expressly authorized" to bring suit.[6] Accordingly, State Fair's arguments concerning this court's lack of jurisdiction to issue a warrant must be rejected.

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[5] The statute provides for 45 days' written notice to the Attorney General before the Commission may proceed through its own legal representative. While no such notice has been given, the Commission has been represented throughout these proceedings by attorneys from the Department of Justice as well as by its own attorneys, thus satisfying the statutory requirement.

[6] In an apparent attempt to come within the provision of § 1345 authorizing suit by the United States, some pleadings on behalf of the Commission have purportedly been filed by the United States. In light of its holding on the jurisdictional questions discussed above, the court has treated these pleadings as having been filed by the Commission. The United States is not a party to this action, and its inclusion as a party would raise substantial questions of its standing. *See Gibson's, supra*, at 676 n.10; *In re Debs*, 158 U.S. 564 (1895); *United States* v. *Solomon*, 563 F.2d 1121 (4th Cir. 1977); Note, *Nonstatutory Executive Authority to Bring Suit*, 85 Harv.L.Rev. 1566, 1571 (1972). Such questions are avoided in the case of an action brought by the Commission pursuant to its statutory authority.

II. *Scope of This Court's Review*

The Commission argues at some length that the scope of this court's review of its decision to investigate a particular product or entity must necessarily be limited. In so arguing, it analogizes this proceeding to an action for enforcement of an administrative subpoena *duces tecum*, and points to that line of cases, discussed more fully below, which holds that a district court may not inquire into an agency jurisdiction so long as the material sought by subpoena is not "plainly incompetent or irrelevant to any lawful purpose" of an agency. *See Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509, 63 S.Ct. 339, 343, 87 L.Ed. 424 (1943). This doctrine, while not strictly one of exhaustion of administrative remedies, stems from concerns over the effects of premature judicial interference with administrative processes similar to those which have prompted the exhaustion doctrine. In the exhaustion area, the law is clear that a litigant may bypass available administrative procedures only where there is a readily observable usurpation of power not granted to the agency by Congress. *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). *American General Insurance Co.* v. *F.T.C.*, 496 F.2d 197, 200 (5th Cir. 1974); *United States* v. *Feaster*, 410 F.2d 1354, 1366-68 (5th Cir.), *cert. denied*, 396 U.S. 962, 90 S.Ct. 427, 24 L.Ed.2d 426 (1969).

In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), the Court was faced with the question of the scope of review of the jurisdiction of the Wage and Hour Administration in enforcement by a district court of the Administrator's subpoena *duces tecum*. In holding that the district court must enforce the subpoena without requiring the Administrator to demonstrate his jurisdiction, the Court stated:

> Congress has authorized the Administrator, rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the district court in enforcing it.

327 U.S. at 214, 66 S.Ct. at 508. *Accord, United States* v. *Morton Salt Co.*, 338 U.S. 632, 641-43, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Endicott Johnson Corp.* v. *Perkins, supra*, 317 U.S. at 509, 63 S.Ct. 339; *F.T.C.* v. *Texaco, Inc.*, 180 U.S.App.D.C. 390, 399-401, 555 F.2d 862, 871-73 (D.C.Cir.), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977)); *F.T.C.* v. *Gibson*, 460 F.2d 605, 608 (5th Cir. 1972); *Genuine Parts Co.* v. *F.T.C.*, 445 F.2d 1382, 1391 (5th Cir. 1971). In these cases, the courts have reasoned that the minimal expense and disruption suffered by a private party as a result of an agency investigation is generally insufficient to warrant cutting off the agency's inquiry, often before it has obtained sufficient facts to clearly demonstrate its jurisdiction. *See Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938).

All these cases arose in the context of district court enforcement of administrative subpoenas. While the scope of review of administrative search warrants rests upon the same balancing of the conflicting interests of agencies and private parties as in the case of administrative subpoenas, the differing degrees of hardship suffered by the party under investigation may warrant a different resolution of the issue. The Court in the *Oklahoma Press* case expressly recognized that a judicial order providing for enforcement of a subpoena *duces tecum* did not present the same Fourth Amendment considerations as would an actual search and seizure. *Oklahoma Press, supra,* 327 U.S. at 195-96, 202-08, 66 S.Ct. 494. An administrative subpoena, requiring production of documents for examination and copying and witnesses for examination under oath, constitutes a far less serious disruption of an organization's day-to-day activities than does the physical entry of agency employees onto the organization's business premises for inspection purposes. *Cf. See* v. *City of Seattle,* 387 U.S. 541, 545, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (illogical to require greater safeguards for subpoenas than for warrants). At the same time, the disruption inherent in the execution of an administrative inspection warrant formed the basis for the Supreme Court's recent decision in *Barlow's, supra,* and so it is logical to turn to that case for aid in applying this balancing test.

In describing the functions served by an administrative inspection warrant, Justice White wrote for the Court that

> [t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative offices, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitu-

> tion, *is authorized by statute,* and is pursuant to an administrative plan containing specific neutral criteria.

436 U.S. at 323, 98 S.Ct. at 1825-1826 (emphasis supplied). Justice Stevens in dissent echoed these three functions (although he argued that the purposes of administrative warrants were otherwise met), stating that one purpose of the inspection warrant is "to inform the employer that the inspection is authorized by the statute." 436 U.S. at 332, 98 S.Ct. at 1830. Thus it would appear that one element of the "administrative probable cause" which must be found by the magistrate is statutory authority for the inspection.

This view is supported by the analysis in *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), upon which the decision in *Barlow's* was in large measure based. In *Camara,* the government asserted that the function of a magistrate in issuing an administrative warrant must necessarily be ministerial unless he is willing to engage in a comprehensive review of the exercise of agency discretion which led to the request for the warrant. In responding to this argument, the Court noted that the magistrate's function involved review of a number of matters, including the authority of the inspection, the lawful limits of his power to search, and whether nonconsensual entry onto private premises was required in order to enforce the statute, all of which could be determined without reassessment of the discretion exercised by the agency. The teaching of *Camara* and *Barlow's* is that one of the purposes served by the administrative warrant requirement is to assure the landowner that a neutral official is satisfied that the agency is authorized by law to conduct the search. Thus it follows that a magistrate must examine an agency's statutory jurisdiction as a prerequisite to authorization of the more intrusive investigatory remedy of administrative search.

This holding in no way thwarts the Commission in its preliminary efforts to obtain sufficient facts on which to base an informed assessment of its own jurisdiction. The Commission has a broad spectrum of investigatory tools at its disposal. In addition to inspections pursuant to 15 U.S.C. § 2065 and 16 C.F.R. § 1182 [44 Fed.Reg. 31,929-30(1979)], the Commission may issue subpoenas *duces tecum*, 15 U.S.C. § 2076(b)(3); 16 C.F.R. §§ 1118.3(a)(1) and 1118.4; conduct investigational hearings, 15 U.S.C. § 2076(a); 16 C.F.R. §§ 1118.3(a)(2) and 1118.5; take depositions, 15 U.S.C. § 2076(b)(4); 16 C.F.R. §§ 1118.3(a)(3) and 1118.6; and issue general or special orders (analogous to interrogatories under Fed.R.Civ.P. 33), 15 U.S.C. § 2076(b)(1); 16 C.F.R. §§ 11183.(a)(4) and 1118.8. The court today holds only that the Commission must be able to demonstrate its own jurisdiction before seeking the aid of the court in making use of the most disruptive of the arrows in this investigatory quiver. The Commission having chosen to proceed by administrative search warrant without first conducting an investigation by other means, it becomes this court's task to determine whether the limited record before it demonstrates that the Commission has jurisdiction. This in turn depends on whether State Fair's aerial tramway is a "consumer product" under the Act, and on whether inspection of the tramway is authorized by 15 U.S.C. § 2065. To each of these questions the court now turns.

III. *The Aerial Tramway's Status as a "Consumer Product"*

In order for § 16(a)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2065(a)(1), to authorize an inspection of the aerial tramway at the State Fair, the ride must be a consumer product within the meaning of § 3(a)(1) of the Act, 15 U.S.C. § 2052(a)(1). The issue of whether an amusement park ride is a consumer product within the meaning of this Act is one of first impression in this circuit. Those courts which have addressed this issue offer different answers. In *Consumer Product Safety Commission* v. *Chance Manufacturing Co.*, 441 F. Supp. 228 (D.D.C. 1977), the court held that the "Zipper," a ride consisting primarily of a boom which rotates in a 360 degree arc, is a consumer product. In *Walt Disney Productions* v. *United States Consumer Product Safety Commission*, No. 70-0170-LEW (Px) (C.D.Cal., April 17, 1979), *appeal docketed*, No. 79-3435 (9th Cir. 1979), the court found that the sky rides at Disneyland and Disney World are not consumer products.

Through consideration of the individual elements in the statutory definition of "consumer product," this court concludes that the term covers the aerial tramway here involved. The Act declares that:

> The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around permanent or temporary household or residence, a school,

> in recreation, or otherwise; but such term does not include —
>
> > (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer . . . .

15 U.S.C. § 2052(a)(1). The Act goes on to provide specific exemptions for a variety of products unrelated to this sort of amusement park ride. Redefined, the question with which we are faced is whether this ride is an "article . . . produced or distributed for the personal use . . . or enjoyment of a consumer . . . in recreation" that does not fall within the exception quoted above.

The tramway is an "article," being "an object produced or distributed as a distinct article of commerce, rather than any physical entity that might exist only at an intermediate stage of production." *Consumer Product Safety Commission* v. *Anaconda Co.*, 193 U.S.App.D.C. 160, 165, 593 F.2d 1314, 1319 (D.C.Cir. 1979). That the tramway is large ought not concern us. Were bulk to be considered in determining the boundaries of the term "article," Congress would not have needed to expressly exempt aircraft from designation as a consumer product. See 15 U.S.C. § 2052(a)(1)(H).

The ride was clearly produced "for the personal use . . . or enjoyment" of consumers "in recreation," as those terms are normally understood. We can dispose of a variety of grounds for challenging this assertion. Given the nature of the site of the tramway, and the expense, speed, and other features of the ride itself, an argument that the ride was not intended for the enjoyment of recreation-minded consumers fails.

A second argument is that only household products can properly be considered consumer products. It would be unnatural to read the phrase "in recreation" as modifying the preceding phrase "in or around a . . . household or residence, a school, ..." Because "or" is used in that segment of the definition of consumer product, each of the nouns in that segment serves as an independent jurisdictional base. *Chance, supra* at 233; *ASG Industries, Inc.* v. *Consumer Product Safety Commission,* 193 U.S.App. D.C. 169, 174 n.16, 593 F.2d 1323, 1328 n.16 (D.C. Cir.), *cert. denied,* —— U.S. ——, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979). It follows that a consumer product is not necessarily a household product.

Third, one might assert that the adjective "personal" incorporates the concept of individual dominion and control with respect to transfers to consumers not involving a sale. But courts simply have not held that the term "personal" imports a control requirement. *See Consumer Product Safety Commission* v. *Chance Manufacturing Co.,* supra, at 233; *Kaiser Aluminum & Chemical Corp.* v. *United States Consumer Product Safety Commission,* 574 F.2d 178, 180 (3rd Cir.), *cert. denied,* 439 U.S. 881, 99 S.Ct. 218, 58 L.Ed.2d 193 (1978). In *Chance,* the court held that:

> [t]hough the riders of the Zipper do not control it, own it, or otherwise possess it, their occupancy of its cars and concomitant exposure to whatever dangers it may present are sufficient to satisfy the "personal use, consumption or enjoyment" clause.

Id. In addition, the court asserted that nowhere does the legislative history of the Act suggest that "Congress intended to import a 'control' requirement into the definition of the term 'consumer product.'" *Id.*

Fourth, State Fair argues that because the tramway is not being sold to consumers it cannot be considered a consumer product. This argument also fails. Pointedly, the requirement that the product customarily be "produced or distributed for sale" was eliminated prior to enactment. The amended definition only required that the article be produced or distributed for a consumer's use. *See* Note, *The Consumer Product Safety Commission: An Agency Manual*, 43 Geo.Wash.L.Rev. 1077, 1082-83 (1975). Indeed, the House Report asserted that:

> . . . products which are manufactured for lease and products distributed without charge . . . are included within the definition and would be subject to regulation . . . . Also, products which are primarily or exclusively sold to industrial or institutional buyers would be included within the definition of consumer product so long as they were produced or distributed for the *use* of consumers.

H.R.Rep.No. 1153, 92d Cong., 2d Sess. 27 (1972).

Finally, the ride is not a product which is "not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of a consumer." This exclusion was intended to exclude industrial products, on the premise that industrial purchasers can better protect themselves and are subject to regulation under the Occupational Safety and Health Act of 1970. *Kaiser Aluminum, supra*, at 180-81. It can hardly be maintained that aerial tramways are produced for any reason but for the use or enjoyment of a consumer: the ride is simply not an industrial product. Moreover, this ride, though not purchased by consumers, exposes them to possible dangers and is not regulated under OSHA.

The only forceful argument that the ride cannot be considered a "consumer product" lies outside the definition provided by the Act. As the court in *Disney, supra,* pointed out, § 2066(b) authorizes the Commission to obtain "free samples" of any consumer product offered for import into the United States and § 2076(f) authorizes the Commission, in the exercise of its functions, to purchase at cost any consumer product it needs. Because of the cost of aerial tramways, it seems unrealistic to speak of acquiring them free or at cost. But were the ability to be sampled required of a consumer product, there would have been no need to expressly exempt aircraft from the Act's coverage. And while acquiring samples of an entire tramway may not be feasible, the Commission may well acquire various components thereof. Given that the tramway fits comfortably within that language in the Act expressly set out as the definition of consumer product, a peripheral appearance of inconsistency ought not affect the outcome. Any inconsistency is peripheral at best because there is nothing in the idea that the Commission is authorized to obtain samples that leads one to the conclusion that where it is impractical to do so, no right of inspection was intended. The Commission is authorized, not required, to sample.

IV. *The Commission's Inspection Authority*

The foregoing analysis demonstrates that State Fair's aerial tramway is encompassed within the expansive definition of "consumer product" contained in 15 U.S.C. § 2052(a)(1). The answer to this question does not resolve the present dispute, however, but merely brings a subsidiary question into focus. Once it is determined by reference to § 2052(a)(1) that a product is a "consumer product" under the Act, it is necessary to turn to § 2065 and related sections to determine the entities in whose hands the product is subject to inspection and the locations in which the product may be inspected. We find that the Commission has not yet provided this court with enough information to demonstrate its authority to conduct this investigation.

15 U.S.C. § 2065(a) authorizes the Commission "to enter, at reasonable times, any factory, warehouse, or establishment in which consumer products are manufactured or held, in connection with distribution in commerce" and "to inspect . . . those areas of such factory, warehouse, or establishment where such products are manufactured, held, or transported and which may relate to the safety of such product." To fully interpret this language, it is necessary to make use of the various definitions contained in 15 U.S.C. § 2052(a).

The Commission first argues that State Fair and S & S have manufactured the tramway. 15 U.S.C. § 2052(a)(8) defines "manufactured" as "to manufacture, produce, or assemble." The Commission points to the action of State Fair in supplying the earth fill to raise the surface of the land for use as the north terminal of the tramway as an act of manufacture, and argues that State Fair and S & S "assemble" the tramway whenever they perform routine maintenance on the tramway, such as replacing worn components or repairing or replacing malfunctioning parts.

The weakness of the Commission's argument is clear. Congress cannot have intended that any person who assists in the installation of a consumer product or performs routine repairs or maintenance on such a product has thereby "manufactured" the product. Such an argument would mean that a television repairman replacing tubes in a set, an electrician replacing a worn cord on a lamp, or even a parent replacing the chain on his child's bicycle, is "manufacturing" the consumer product on which he works. Congress cannot have intended such an anomalous result.

A more reasonable interpretation of Congress' purpose in defining "manufactured" to include "to assemble" is that Congress intended to embrace the situation where a factory receives component parts manufactured elsewhere and constructs ("assembles") consumer products on its premises from these component parts. For example, a factory assembling television sets from component parts manufactured elsewhere is itself a manufacturer within the meaning of the Act. Common sense indicates that this is the situation that Congress had in mind when it defined "manufactured" to include "to assemble," and not the situation in which routine maintenance and repairs are performed on an individual product, as is the case with the tramway at State Fair. Similarly, assistance in the installation of a single product does not render the person providing such assistance a manufacturer under the Act. We are not saying that the Commission will not be able to show that State Fair did not "assemble" the tramway, but only that the Commission has not yet done so.

The Commission next argues that State Fair is an "establishment in which consumer products are . . . held, in connection with distribution in commerce." *See* 15 U.S.C. § 2065(a)(1)(A). "Distribution in commerce" is defined by 15 U.S.C. § 2052(a)(11) as meaning "to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." The Commission relies principally on the third prong of this definition, arguing that the tramway is "held for sale or distribution after introduction into commerce."[7] With respect to the argument that the tramway is held for sale by State Fair or S & S, however, it must be remembered that the consumer product in this case is the tramway itself and not the licenses (tickets) which allow passengers to be transported on the tramway. The latter are not "articles" within the meaning of 15 U.S.C. § 2052(a)(1), since they constitute no more than "an abstract right to occupy an amusement device." *See Albert* v. *State,* 80 Misc.2d 105, 362 N.Y.S.2d 341, 344 (Ct.Cl. 1974), *aff'd* 51 A.D.2d 611, 378 N.Y.S.2d 125 (1976). It is undisputed that State Fair has no intention of selling the physical equipment which comprises the tramway to anyone.

The question thus becomes whether or not State Fair and S & S are holding the tramway for distribution after introduction into commerce within the meaning of § 2052(a)(11). Neither the Act nor its legislative history provide substantial guidance as to the meaning of the phrase "to hold for distribution after introduction into commerce." A mechanical reapplication of the definition of "distribution in commerce" in § 2052(a)(11) would lead to the circular result that the phrase means "to hold for sale in commerce, to hold for introduction or delivery for introduction into commerce, or to hold for sale or distribution after introduction into commerce." Hence it is necessary to give a broader definition to the term distribution than is contained in that section. The concept of distribution, as that term is used in a generic sense, does generally involve a transfer of possession or control over an object. One does not ordinarily speak of a product being "distributed" when it is merely made available for public use without such a transfer. In this case, neither possession nor control of the tramway ever passes to consumers. A passenger on a Skyride never controls the Skyride; instead, he or she merely sits passively in the gondola of the tramway.[8] Nor can the passenger be said to possess the ride in any way, any more than a patron in a theater can be said to possess the seat from which he watches the performance.[9] Because neither possession nor control of the tramway passes to the consumer, State Fair and S & S do not distribute the ride, and cannot be said to hold the ride for distribution after introduction into commerce.

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[7] Since the tramway was manufactured in Switzerland and imported into the United States several years before it came into the hands of State Fair, it cannot seriously be contended that State Fair is holding the tramway itself for introduction into commerce or for delivery for introduction into commerce. The concept of introduction into commerce or delivery for introduction into commerce denotes the first transportation of a product in interstate commerce or the delivery of a product for its first transportation in interstate commerce. These functions were accomplished at the time the tramway was imported into the United States.

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[8] While the concept of consumer control is only marginally relevant to the definition of a "consumer product," *Chance, supra,* at 233, it is intimately related to the ordinary definition of "distribution." Thus the statement of the court in *Chance* that "the legislative history of the Act nowhere suggests that Congress intended to import a 'control' requirement into the definition of the term 'consumer product'" is fully consistent with this analysis. There the court was considering the definition of consumer product; here the court must analyze the concept of distribution.

If Congress had intended the mere leasing or licensing of a product to constitute distribution in commerce, Congress could have easily done so as explicitly as in its definition of "consumer product." While Congress, during the legislative process, specifically altered the definition of "consumer product" to include products produced for use by consumers (and hence including those products which are leased or provided without charge), Note, *supra*, 43 Geo. Wash. L.Rev. at 1082-83; H.R.Rep.No. 1153, 92d Cong., 2d Sess. 27 (1972); H.R.Rep.No. 1593, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Admin.News, pp. 4596, 4629, it did not add corresponding language to the "manufactured or held, in connection with distribution in commerce" language of § 2065(a)(1) or the definitions of "distributor" or "distribution in commerce" in §§ 2052(a)(5) and 2052(a)(11), respectively. This court ought not broaden the inspection authority beyond that palpably signaled by Congress.

A similar analysis must be undertaken with respect to the language of 15 U.S.C. § 2065(a)(2), which permits *inspection* of consumer products within the areas the Commission may *enter* pursuant to § 2065(a)(1). The Commission argues that the former section, which speaks of areas where products are held, without the constraints of a "distribution in commerce" requirement, provides an independent and more expansive grant of authority to the Commission. To read § 2065(a)(2) in such a manner, however, would render § 2065(a)(1) superfluous. Section 2065(a)(2), which speaks of "*such* factory, warehouse, or establishment" (emphasis supplied) must necessarily be held to relate back to § 2065 (a)(1) for a determination of which factories, warehouses, and establishments are encompassed within the provisions of the second subsection. Thus the "in connection with distribution in commerce" requirement, while not appearing directly in § 2065(a)(2), is engrafted onto that section through its relationship with § 2065(a)(1).

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[9] To carry this analogy even further, can an observer in a courtroom be said to possess the seat from which he observes the proceedings? Is it possible that Congress could have intended that the courtroom seat—which occasionally may be repaired by those who maintain the court facility—be considered as "manufactured" by the court and "held for distribution in commerce" by the courts?

The conditions under which the Commission may inspect books and records relating to consumer products, as distinguished from the products themselves, are set forth in § 2065(b). Under that section, the Commission is entitled to inspection if State Fair is a "manufacturer, private labeler, or distributor" of a consumer product. "Manufacturer" is defined by § 2052(a)(4) to mean one who manufactures or imports. "Private labeler" is defined as "an owner of a brand or trademark on the label of a consumer product which bears a label." 15 U.S.C. § 2052(a)(7)(A). Finally, "distributor" is defined by § 2052 (a)(5) as "a person to whom a consumer product is delivered or sold for purposes of distribution in commerce."

The arguments that State Fair has manufactured the tramway, or is distributing it in commerce, have already been discussed at length and rejected insofar as the record before this court permits. That record also indicates that State Fair did not import the tramway, and instead purchased it from a domestic owner several years after its importation. Thus the argument turns on whether State Fair is a "private labeler" under the Act.

The Commission argues that State Fair is the owner of the trademarks "Skyride" and "Swiss Skyride," based on a 1971 agreement between State Fair and the previous owner of the tramway which purports to assign those trademarks to State Fair as part of State Fair's purchase of the ride itself. We find that the Commission has yet to provide sufficient evidence to show that State Fair ought to be considered a "private labeler." Even if these terms are regarded as brands or trademarks owned by State Fair, the legislative history of the Act raises questions concerning whether State Fair is encompassed within the term "private labeler": "a 'private labeler' is defined to mean an owner of a brand or trademark which is placed on a consumer product *in lieu of* that of the manufacturer's [sic]." H.R. Rep.No. 1153, 92d Cong., 2d Sess. 28 (1972) (emphasis supplied). The House Report further indicates that the focus of the private labeler definition involves "a person [who] holds himself out as manufacturing a product and standing behind the product's quality or performance." *Id.* Little or no evidence of the nature of the labeling on the aerial tramway has been offered and the court is not able to determine State Fair's status as a "private labeler" on the record before it.

V. *Summary*

Two vital considerations are at stake in disputes involving administrative investigations. On the one hand, the public interest might be served by the efficiencies of unfettered probes into the lives of subject individuals or organizations. On the other hand, the multitudinous facets of the right to be let alone are not merely classroom ideals but are core constitutional concepts.

These considerations manifest themselves in the applicable law. For example, while the legislative history clearly demonstrates that Congress intended as broad as possible a definition of consumer products within the scope of the Commission's jurisdiction, Congress was careful enough to provide that those products which meet the Act's definition are not subject to inspection regardless of their location or ownership. Hence we find the tramway is indeed a "consumer product," but we also find that the Commission has not yet shown it can inspect the ride in the hands of State Fair and S & S. The dangers of excessive government interference are minimized at little loss of efficiency through the Commission's use of the more limited modes of investigation for which Congress has expressly provided. In this fashion, the Commission can generate the information which may make it possible for a court to be sure that the broader search made possible by a warrant is permissible.

An administrative agency vested by Congress with investigative and inquisitorial powers must be allowed to first determine if a product or firm is within its congressional charge except in those cases, hopefully few in number, when jurisdiction is obviously absent. *Leedom* v. *Kyne, supra.* That principle of administrative law is long established and is here again affirmed. It will allow the Commission to proceed with an extensive array of investigative devices including, for example, in the case of administrative subpoenas, the enforcement power of the courts, all without having the investigative process nipped in its infancy by jurisdictional hairsplitting. To apply this deferential standard to the issuance of warrants would further limit the already limited interpositional role of the magistrate and denigrate a firm's right of privacy.

To be sure, allowing an administrative agency to first determine its own jurisdiction may impose expense upon those subject to investigation and inconvenience them—all without a showing that "jurisdiction" is present. The corresponding benefits of this jurisdiction-to-determine-jurisdiction, on the other hand, include the avoidance of slowing the inquisitorial process and other by-product values such as agency maturation and self-discipline as well as extra-judicial dispute resolution.

In summary, the Commission's jurisdiction here is not so plainly absent that it cannot proceed with all its investigative tools except entry and seizure for which an administrative warrant is required. It adds little to argue that these rides ought to be investigated in the public interest. Of course that is true, but that assertion hardly answers the question of who ought to investigate.

Having dealt at length with the intricacies of this case, one final general observation is in order. Government has long required a hunter to produce his license on request when found in hunting fields. Poaching of all kinds has always been regarded as unacceptable. With the individual's right to privacy and the accountability of government agencies on the list of endangered species, it would seem anomalous not to require a federal agency to produce its license from Congress when it hunts. This opinion does no more than that.

Three consolidated actions are now pending before the court. In No. 3-79-132M, the motion to quash the *ex parte* administrative inspection warrant is GRANTED without prejudice to future application for a warrant should the Commission's investigation, otherwise conducted, develop facts sufficient to support a finding that the Consumer Safety Product Act is applicable both to the product and to the firm to be inspected. The motion for an order requiring State Fair and S & S to show cause why they should not be held in contempt is DENIED. In Nos. CA-3-79-1367-G and CA-3-79-1388-G, the remaining prayers for injunctive relief are DENIED. The respective plaintiffs are granted and denied declaratory relief in conformity with the foregoing opinion. Judgments will be entered accordingly.

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Petitioner's Reply Brief

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Petitioner

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REPLY TO MEMORANDUM FILED ON BEHALF OF THE CONSUMER PRODUCT SAFETY COMMISSION

The Honorable Rex E. Lee, Solicitor General, in his memorandum filed on behalf of the Consumer Product Safety Commission acknowledges that there is a clear conflict between the decisions of the United States Court of Appeals for the Fifth Circuit in this case and of the United States Court of Appeals for the Tenth Circuit in *Robert K. Bell Enterprises v. Consumer Product Safety Commission*, 645 F.2d 26 (1981) as to whether the skyride is a "consumer product" within the meaning of the Consumer Product Safety Act, 15 U.S.C. 2052(a)(1). In that the Solicitor General is absolutely correct.

The Solicitor General, However, is factually incorrect and his memorandum is misleading when he states, at page 4: "... the Commission has abandoned its investigation of the Skyride. ..."

There is presently pending before the United States Consumer Product Safety Commission as No. 80-8 on its docket a complaint filed by the Commission against the State Fair of Texas, Steck & Stapf Attractions, Inc., Wayne Gallagher, Executive Vice President and General Manager of the State Fair of Texas and Charles Noland, President of Steck & Stapf Attractions, Inc., a copy of which is attached hereto as Exhibit A, in which the Commission alleges that the respondents violated the terms of the Consumer Product Safety Act because of the operation of the skyride and seeks determinations (1) that the skyride is a consumer product, (2) that it is distributed in commerce, and (3) that it presents a "substantial product hazard". The Commission is asked to order the respondents to repair the skyride, to conduct tests on it acceptable to the Commission, to provide proof, acceptable to the Commission, of the safe operation of the ride, to keep records of any and all repairs and modifications of the ride and of any and all tests thereof, to provide records of the repairs and modifications and tests to the Commission on request, to file reports with the Commission, and to permit inspections to verify data in reports, etc. Finally, the complaint asks that the Commission assess an appropriate civil penalty against the State Fair and Steck & Stapf for violating the Act.

The respondents respectfully submit that the matter is far from moot and the Commission, despite the adoption of the Omnibus Budget Reconciliation Act to which the Solicitor General makes reference, has not abandoned or dismissed the complaint. It is still very much alive on the

Commission's docket although temporarily stayed pending a determination by this Court of this case.

For the foregoing reasons, petitioner respectfully prays that its Petition for Writ of Certiorari not be dismissed and that it have the relief which it seeks in its Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Memorandum Filed on Behalf of The Consumer Product Safety Commission has been furnished to the following counsel of record by United States mail, on this the ________ day of ________, 1981:

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of

State Fair of Texas,
a corporation

Steck and Stapf Attractions, Inc.
a corporation

Wayne Galagher, an individual
and officer of State Fair of Texas

Charles Noland, an individual
and officer of Steck and Stapf
Attractions, Inc.

CPSC
Docket
No. 80-8

COMPLAINT

Jurisdiction

1. This proceeding is instituted pursuant to the authority contained in sections 15(b), (d), (e) and (f), 19 and 20 of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2064(b), (d), (e), and (f), 2068 and 1069.

Parties

2. Respondent State Fair of Texas (State Fair is a non-profit corporation organized under the laws of the State of Texas with its principal place of business at State Fair Grounds, Post Office Box 25010, Dallas, Texas. Respondent State Fair of Texas is the owner of an aerial tramway known as a "Swiss Skyride" (herein referred to as Skyride) located on the respondent's premises, the fair grounds of the State Fair of Texas.

3. Respondent Steck and Stapf Attractions, Inc. (Steck and Stapf) is a corporation organized and existing under the laws of the State of Texas with its principal corporate offices at 1810 Hinton Street, Dallas, Texas 75226. Steck and Stapf Attractions, Inc. have operated and maintained the "Swiss Skyride" since 1972.

4. Respondent Charles Noland is President of Steck and Stapf Attractions, Inc., Fair Park, Dallas, Texas 75226 and as such is responsible for its acts, operations, and policies.

5. Respondent Wayne Gallagher is Executive Vice President and General Manager of State Fair of Texas, Fair Park, Dallas, Texas and, as such, is responsible for its acts, operations, and policies.

The Consumer Product

6. "Swiss Skyride" is an amusement park ride, specifically an aerial tramway that consists of substantial permanent structure on which passengers are given rides in gondola cars along a cable route suspended in the air. The tramway is approximately 1 mile long.

7. The Skyride was partially manufactured by von Roll Ltd., Berne, Switzerland. It was imported into the United States and erected on the grounds of the State Fair of Texas prior to October 1, 1964 by Rogers and Gulledge, Inc., a corporation organized and existing under the laws of the State of Texas with its principal corporate office at 212 East Mimosa Circle, San Marcos, Texas, 78666. The State Fair of Texas purchased the Swiss Skyride in December 1971 from Rogers and Gulledge, Inc. and since this purchase the Skyride has been operated and maintained for the State Fair by Steck and Stapf Attractions, Inc.

8. The Skyride is a ride which was produced and distributed for the personal use, consumption, or enjoyment of

consumers in recreation or otherwise and is a consumer product within the meaning of section 3(a)(1) of the CPSA, 15 U.S.C. 2052(a)(1).

9. The Skyride was open to public ridership during two periods each year — on weekends April 1 through September 1 and during the State Fair in October. Since the date of the accident October 21, 1979, the ride has not reopened. The ride was distributed in commerce within the meaning of sections 3(a)(11) and (12) of the CPSA, 15 U.S.C. 2052(a)(11) and (12), and sections 15(c) and (d) of the CPSA, 15 U.S.C. 2064(c) and (d).

10. State Fair of Texas has manufactured, produced or assembled the Skyride and is thereby a manufacturer within the meaning of section 3(a)(4) of the CPSA, 15 U.S.C. 2052(a)(4). In the alternative State Fair of Texas as owner of the Skyride has contracted with Steck and Stapf to open and operate the Skyride for the public's recreational use. State Fair is thereby a distributor within the meaning of section 3(a)(5) of the CPSA, 15 U.S.C. 2052(a)(5).

11. Steck and Stapf Attractions, Inc. sells tickets to the public to ride on the Skyride for their enjoyment in recreation and operates the ride. Steck and Stapf is thereby a retailer within the meaning of section 3(a)(6) of the CPSA, 15 U.S.C. 2052(a)(6).

12. The Skyride consists of machine drive systems, cable support towers, and other equipment manufactured and sold by von Roll, Ltd., a Swiss manufacturer, under the name of "von Roll Sky Way," as well as passenger gondolas, terminal stations, foundations and other ancillary structures which have been procured or constructed by the State Fair of Texas.

13. The ride has eight towers supporting a haul rope cable that runs between two stations. Passengers may be loaded and unloaded onto the gondolas (cars) at either station.

14. The gondolas are attached to a single wirerope cable (hereinafter referred to as a cable) by a cable grip or cable coupling assembly. Roller batteries support the cable atop each tower and the roller batteries, by pivoting a few degrees, allow the cable grip to pass over the tower.

15. The ride has two electrical circuits: a high voltage circuit which runs the Skyride's main drive system and a lower voltage circuit which operates the various safety switches. The ride has a variety of such safety switches that are designed to shut down the ride instantly. There are safety switches at each station that determine whether the cable grip of each gondola is properly clamped to the cable. In addition, there are upper and lower limit switches on the counterweight that should shut down the ride in the event of changes in cable tension. There are also derailment switches on each roller battery that are designed to shut down the ride in the event the cable comes off the roller battery sheaves. Manual emergency shut down switches are located at each station. In the event of an opening of the safety circuit, the ride is designed to shut down immediately.

COUNT I

The Substantial Product Hazard

16. Paragraphs 1-15 are realleged.

17. On October 21, 1979 a fatal accident occurred at the State Fair of Texas, Fair Park, Dallas, Texas when two gondolas on the Swiss Skyride fell to the ground. Besides the one death, there was also one person paralyzed, two

persons incapacitated for over a month and, in all, eighteen persons injured as a result of this incident.

18. At the time of the accident, winds in the vicinity of the State Fair were blowing in excess of 21 mph with gusting in excess of 31 mph. Witness reports indicated that the gondolas were swaying from west to east (the Skyride runs north to south) and in some cases hitting the ride's towers. The side-to-side swaying of a gondola caused a dislocation of the cable out of the sheaves on the roller battery of the fourth tower.

19. While the cable remained suspended on the roller battery, a gondola became hung up on the roller battery. As the cable continued to pass through the gondola's cable grip, the other gondolas were pulled into the fourth tower's roller battery where they piled into one another. When the fourth gondola struck the three stationary gondolas at the tower, the cable came off the roller battery entirely and became free of the tower. This caused two gondolas (the second and third in the pile up) to come off the cable and plummet to the ground.

20. Although the Skyride was equipped with a derailment switch on the roller battery, emergency stop buttons in the stations, and counterweight limit switches, none of these functioned during the accident sequence. The Skyride continued to operate for approximately one minute after the gondolas fell, and the ride had to be shut down at the main engine.

21. Prior to or during the accident sequence a break occurred in the electrical wiring to the roller battery derailment switch and the wiring between the secondary safety circuit in one or both of the stations. A break in the wiring is supposed to open the circuit and shut down the ride. The tripping of the derailment or counterweight switches, or the

emergency switch should have shut down the ride. It appears, however, that the safety circuit had been bypassed at some time prior to the accident.

22. There was no functioning electrical safety system and this lack of a functioning electrical safety system constitutes a defect in the ride within the meaning of section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2).

23. The ride was not equipped with a device to measure the wind velocity. Such a device would inform the operator of the ride that it would be unsafe to continue operation and necessary to shut the ride down. This lack of a wind detection device is a defect in the ride within the meaning of section 15(a)(2) of the CPSA, 2064(a)(2).

24. The ride was not equipped with cable catchers to retain the cable on the roller battery. Cable catchers are recommended by the manufacturer as an integral safety device. This lack of cable catchers is a defect in the ride within the meaning of section 15 (a)(2) of the CPSA, 15 U.S.C. 2064(a)(2).

25. The defects in the ride arise from the ride's design and/or operation.

26. The defects have and will manifest themselves during normal use of the ride by consumers.

27. The Skyride contains defects which because of the pattern of defects, the seriousness of the injury that can occur, and the population exposed to the risk of injury create a substantial risk of injury within the meaning of section 15(a)(2) and (d) of the CPSA, 15 U.S.C. 2064(a)(2), and (d).

28. The Skyride creates a "substantial product hazard" to the public within the meaning of sections 15(a)(2), and (d) of the CPSA, 15 U.S.C. 2064(a)(2), and (d).

COUNT II

The Failure to Inform the Commission

29. Paragraphs 1-28 are hereby realleged.

30. Section 15(b) of the CPSA, 15 U.S.C. 2064(b) requires every manufacturer, distributor or retailer of a consumer product distributed incommerce to immediately notify the Commission upon receipt of information which reasonably supports the conclusion that such product contains a defect(s) which could create a substantial product hazard, unless such party has actual knowledge that the Commission is adequately informed.

31. Violations of the requirements of section 15(b) of the CPSA are prohibited acts under sections 19(a)(3) and 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(3) and 2068(a)(4).

32. After the October 21, 1979, accident on the Skyride, respondents refused to permit Commission investigators complete access to the ride and to provide information concerning the ride, its operation and the accident.

33. Respondents knowingly failed to immediately and adequately inform the Commission upon having obtained information which reasonably supported the conclusion that the Skyride contained a defect or defects which could create a substantial product hazard, as required by section 15(b) of the CPSA, 15 U.S.C. 2064(b). This information includes the fact that the Skyride had no functioning electrical safety system, no device to measure wind velocity, and insufficient cable catchers.

Relief Sought

Wherefore in the public interest the staff of the Consumer Product Safety Commission requests that the Commission, after affording interested persons an opportunity for a hearing:

1. Determine that the Skyride is a consumer product within the meaning of section 3(a)(1) of the CPSA, 15 U.S.C. 2052(a)(1) as produced "for the personal use...or enjoyment" of consumers "in recreation".

2. Determine that the product is distributed in commerce within the meaning of section 3(a)(11) and (12) of the CPSA, 15 U.S.C. 2052(a)(11) and (12) when the riders occupy Skyride cars and are exposed to whatever dangers they may present.

3. Determine that the Skyride presents a "substantial product hazard" and that an action under section 15(d) of the CPSA, 15 U.S.C. 2064(d), be determined to be in the public interest.

4. Order respondents to:

(a) repair the Skyride to eliminate the defects in a manner satisfactory to the Commission;

(b) after the ride has been repaired, conduct tests on it acceptable to the Commission that are designed to show that the hazard has been eliminated;

(c) provide proof, acceptable to the Commission, of the safe operation of the ride after it has been repaired.

5. Prohibit respondents from distributing the ride until thy have complied with the provisions of paragraph 4(a) through (c) above.

6. Order respondents to:

(a) keep records of any and all repairs and modifications of the rides and any and all tests of the ride;

(b) provide all of the records in paragraph (a) above and/

or extracts of information from them to the Commission on request;

(c) file reports with the Commission containing information that may be requested by the staff to determine compliance with any order issued in this proceeding at thirty (30) day intervals until the actions required in paragraph 4 above is completed and the Commission agrees that reports are no longer necessary;

(d) permit inspections at respondents' ride and other places of business to verify data in reports submitted and ascertain compliance with any order issued in this proceeding.

7. Order the respondents to notify the Commission at least thirty (30) days prior to any change in its business (such as incorporation, dissolution, assignment, sale, or declaration of bankruptcy) that results in the emergence of a successor corporation, the creation or dissolution of subsidiaries, the dissolution of the corporation, or any other change that might affect compliance obligations under any Commission order.

8. Assess an appropriate civil penalty pursuant to section 20 of the CPSA against State Fair and Steck & Stapf for knowingly violating sections 19(a)(3) and 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(3) and 1068(a)(4).

9. Grant such other and further relief as the Commission deems necessary to protect the public health and safety and to implement the Consumer Product Safety Act.

DAVID SCHMELTZER,
Associate Executive Director
for Compliance & Enforcement